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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

NELSON and JOAN FERNANDES,
Petitioner(s),

V.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Respondent(s).

On Petition for Writ of Certiorari
To The Appellate Division of New Jersey

Petition for Writ of Certiorari

Mr. and Mrs. Nelson Fernandes
9 Fox Run
Denville, New Jersey 07834
(973) 627-2138

QUESTIONS - R.14(a)

1. Is the 7/21/04 judgment void on its face by affirming the 10/21/03 order, then dismissing for; exhaustion and on the merits based on advisory opinions, making it a usurpation of power, a denial of due process, and a denial of a fair trial, which warrants recusal.
2. Did the trial judge usurp his power and deny due process by entering res judicata in this case based on the former dismissal with prejudice and does his conduct in both cases constitute a structural error that also warrants recusal.
3. Did the judge misrepresent events that occurred in court proceedings making them extrajudicial, proof of bias, and do they violate judicial canons, and do they also warrant recusal.
4. Did the Appellate Division's avoidance of; the recusal, notice, void judgment, judicial estoppel issues, and dismissal for exhaustion withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, thus requiring this Court to decide these issues.
5. Did Sparta or its attorneys violate judicial estoppel and does that violation constitute a fraud upon the court that entitles petitioners to recover the money spent for their attorney and costs so they can proceed with the trial that was interrupted by these violations.
6. Can this Court sua sponte address judicial estoppel and conduct that flows from it, such as; surprise, entering advisory opinions to dismiss, and violations of canons and RPC in order to protect the integrity of the judicial process.

PARTIES - R.14(b)

Petitioners: Nelson & Joan Fernandes, Pro Se

Respondents: Sparta Township Council, Sparta Township Manager, & Sparta Township Engineer

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Proceedings in the Superior Court of N.J., Law Division

The 10/21/03 summary judgment order (P12) shows the judge assumed jurisdiction by deciding the Safe Drinking Water Act (SDWA) does not statutorily apply to petitioner's lot and ordered a trial. The judge denied reconsideration of this order in its 11/26/03 (P36) and 2/26/04 (P40) orders.

On its face, the 7/21/04 judgment (P23) affirms the 10/21/03 order, then dismisses the complaint for exhaustion P28-30). The judge then assumed hypothethical jurisdiction to enter advisory opinions and a dismissal with prejudice (P34).

In this case, the judge entered his 6/23/06 (P1) summary judgment order on res judicata grounds based on the dismissal with prejudice entered after he dismissed the former complaint for a lack of jurisdiction. Then denied petioner's recusal motion.

Proceedings in the Superior Court of N.J., Appellate Division

The Appellate Division affirmed res judicata in its 6/14/07 opinion (P8) by disregarding the dismissal for exhaustion so it could rely on advisory opinions rendered after the judge relinquished his jurisdiction to support its affirmation. It also denied a timely motion for reconsideration on 7/26/07 (P44).

Proceedings in the N.J. Supreme Court

The N.J. Supreme Court denied certification on 10/31/07 (P11). It also denied a timely motion for reconsideration on 1/18/08 (P45).

JURISDICTION - R.14(e)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) to review issues not reviewed by the Appellate Division since petitioner unsuccessfully petitioned for certification and reconsideration in the New Jersey Supreme Court, before petitioning for review in this Court. ***California v. Trombetta et al.***, 104 S. Ct. 2528, 467 U.S. 479, 484 (U.S. 1984).

Petitioner seeks review of the Appellate Division's 6/14/07 order and opinion (P8).

CONSTITUTIONAL PROVISIONS - R.14(f)

U.S. Const., Fifth Amendment.

The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const., Fourteenth Amendment, Section 1.

Section 1 of the Fourteenth Amendment reads in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.J. Const., Article I - Rights & Privileges

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N.J. Court Rules

R. 1:6-2. Form of Motion; Hearing

(a) Generally. An application to the court for an order shall be by motion, or in special cases, by order to show cause. A motion, other than for bail pursuant to R. 3:26-2(d) or one made during a trial or hearing, shall be by notice of motion in writing unless the court permits it to be made orally. Every motion shall state the time and place when it is to be

presented to the court, the grounds upon which it is made and the nature of the relief sought, and, as to motions filed in the Law Division-Civil Part only, the discovery end date or a statement that no such date has been assigned. The motion shall be accompanied by a proposed form of order in accordance with R. 3:1-4(a) or R. 4:42-1(e), as applicable. The form of order shall note whether the motion was opposed or unopposed. If the motion or response thereto relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit made in compliance with R. 1:6-6. The motion shall be deemed uncontested and there shall be no right to argue orally in opposition unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought. If the motion is withdrawn or the matter settled, counsel shall forthwith inform the court.

R. 1:6-6. Evidence on Motions; Affidavits

If a motion is based on facts not appearing of record, or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein. The court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions.

R. 4:37-2. Involuntary Dismissal; Effect Thereof

d) Dismissal With Prejudice; Exceptions. Unless the order of dismissal otherwise specifies, a dismissal under R. 4:37-2(b) or (c) and any dismissal not specifically provided for by R. 4:37, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits.

R. 4:49-2. Motion to Alter or Amend a Judgment or Order

Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

R. 4:50-1. Grounds of Motion

On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been

satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

R. 4:50-3. Effect of Motion

A motion under R. 4:50 does not suspend the operation of any judgment, order or proceeding or affect the finality of a final judgment, nor does this rule limit the power of a court to set aside a judgment, order or proceeding for fraud upon the court or to entertain an independent action to relieve a party from a judgment, order or proceeding.

R. 4:69-5. Exhaustion of Remedies

Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.

Rules of Professional Conduct

RPC 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;

Judicial Canons

Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The

provisions of this Code should be construed and applied to further that objective.

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Canon 3. A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interest, public clamor, or fear of criticism.

B. Administrative Responsibilities.

(3) A judge has the following disciplinary responsibilities:

(a) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(b) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

Statement of the Case - R.14 (g)

In the former case petitioner filed an inverse condemnation action and motion for summary judgment against Sparta, who waived further jurisdictional arguments by filing a cross-motion.[1] The judge retained primary jurisdiction [2] by entering his 10/21/03 summary judgment order. (P12) That order is the law of the case. [3] It found the SDWA did not statutorily apply and ordered a trial. He denied reconsideration on 11/26/03 (P36) and 2/26/04 (P40).

Sparta violated judicial estoppel [4] by arguing exhaustion and a new theory *(id)* in its May trial brief thus willfully violating the unreversed 10/21/03 order [5] in order to terminate the trial for a lack of

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[1] "In response, plaintiff filed a cross-motion for summary judgment and waived all arguments respecting jurisdiction or procedural deficiencies arising from National Union's intervention." ***Schaser v. State Farm Ins. Co.***, 255 N.J.Super. 169, fn.1 (Law Div. 1992)

[2] " . . retained primary jurisdiction by deciding the summary judgment motion." ***Loigman v. Township Committee of the Tp. of Middletown***, 297 N.J.Super. 287 (App.Div. 1997).

[3] ***Lanzet v. Greenberg***, 126 N.J. 168 (1991) (Summary judgment orders are the "law-of-the-case").

[4] "Aside from the preclusive effect of the summary judgment orders, **Texaco should have been judicially estopped from raising its newly-found theory** . . judicial estoppel precludes a party from assuming a position in a legal proceeding totally inconsistent with the one previously asserted in the same or another proceeding" ***Bahrle v. Exxon Corp.***, 279 N.J. Super. 5, aff. 145 N.J. 144 (N.J. 1996). (emphasis added)

[5] ***Warren County Comm. Coll. v. Warren County Bd. of ChosenFreeholders***, 350 N.J.Super. 489 (A.D. 2002) (" A good motive does not excuse a willful violation of an unreversed court order")

jurisdiction. ***R***.4:69-5. But, it never moved, nor could it move to vacate the law of the case so it could argue exhaustion.[6] (***R***.4:49-2, ***R***.1:6-2).

The 7/21/04 judgment is void on its face (P14). In it, the judge affirms his 10/21/03 order (P23) [7] and refers to an NJDEP letter that shows it would not apply the SDWA 50 foot radius to petitioner's lot.[8] So, he left the 10/21/03 order unreversed.[9] Then, he dismissed the complaint for failure to exhaust SDWA remedies contrary to that order (P28).[10] (***R***.4:69-5)

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[6] Law of the case "could only be changed on notice to defendants and with the opportunity for them to present evidence. . ." In the absence of notice, "the initial ruling nullified the court's subsequent judgment relief." ***Maul v. Kirkman***, 270 N.J.Super. 596, 612-13 (A.D. 1994).

[7] "The Court, in the course of this litigation by Order of October 21, 2003, determined that the **SDWA 50 foot radius requirement applied rather to new or modified well water systems and not existing wells as in the case of plaintiffs' well."** (P23) (emphasis added)

[8] "Also in the course of this litigation, through motion practice, the State of New Jersey Dept. of Environmental Protection has confirmed by letter dated October 16, 2003 that the SDWA 50 foot radius requirement would not be applied." (P23)

[9] "It has been generally stated that the "law of the case" doctrine "applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit."" ***Slowinski v. Valley National Bank***, 264 N.J.Super. 172 (A.D. 1993).

[10] "In this regard, R.4:69-5 provides that "except where it is manifest that the interest of justice requires otherwise, actions in lieu of prerogative writs shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." The reason for the rule is to allow administrative bodies to perform their statutory functions and resolve factual issues in their area of expertise. **The doctrine of exhaustion of**

He also said administrative expertise is required,[11] but a request for relief can be granted "where there is discretion to grant that request" (P30). The judge did not respect his unreversed 10/21/03 order, which found Sparta had no SDWA discretion,[12] ***Canon*** 2, by nullifying the trial retroactively and by relinquishing his jurisdiction for failure to exhaust SDWA remedies.[13] Nor can he render advisory opinions[14] to enter a dismissal with prejudice.[15] So,

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remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that they would have to resolve the SDWA fifty foot radius issue before a building permit issued (P28) ." (compare to fn. 7)

[11] "However, here the underlying issues clearly required administrative expertise and fact finding. The doctrine of futility as an exception to the exhaustion of remedies does not come into play before applicants as plaintiffs even file a request for relief **where there is discretion to grant that request**." (P29) (emphasis added)

[12] "Judges are required to respect unreversed decisions made during the trial . . unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." ***Sisler v. Gannett Co., Inc.***, 222 N.J. Super. 153, 159 (A.D. 1987), cert. den. 110 N.J. 304 (1988)

[13] "Where the failure to exhaust administrative remedies exists, as here, the court is without jurisdiction to entertain the suit and grant the relief sought therein." ***Pleasantville Taxpayers v. City of Pleasantville***, 111 N.J.Super. 377,381-382 aff. 115 N.J.Super. 85 (A.D. 1971)

[14] Notwithstanding the absence of a case or controversy standard in the State Constitution, courts in N.J. do "not render advisory opinions or function in the abstract." Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). ***In re Determination by Dir. of the Div. of A.B.C.***, 921 A.2d 1159 (A.D. 2007)

his latter dismissal usurped the law of the case to create the appearance of a decision on the merits that overrules the right to trial in the 10/21/03 order.

Petitioner subsequently filed this independent action (P46) pursuant to ***R***.4:50-3 in order to file a ***R***.4:50-1(c)&(d) motion to have the 7/21/04 judgment vacated as void and for fraud upon the court. Sparta moved for summary judgment on res judicata grounds by relying on advisory opinions and the dismissal with prejudice rendered after the judge previously relinquished jurisdiction. So this action is not barred since the previous trial was improperly nullified for a lack of jurisdiction.[16] The judge denied the recusal motion (P4) by misrepresenting that petitioner was dissatisfied with his rulings instead of his misrepresentation of the SDWA issue (P52). He then ruled res judicata applied by misrepresenting the current action involved the same issues as the taking claim knowing he rendered advisory opinions without jurisdiction to orchestrate the dismissal with prejudice. He also relied on Sparta's certification (P5). Except, Sparta's attorney admitted he argued exhaustion in his former trial brief (P59). Hence, the judge knew Sparta violated judicial estoppel since the 10/21/03 order remains unreversed. He further knew Sparta violated judicial estoppel by arguing res judicata since the law of the case continues to apply.

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[15] "Plaintiff's Complaint is dismissed with prejudice and without costs." (P4)

[16] "A dismissal based upon the inability of a court to entertain a matter, such as lack of jurisdiction, does not represent an adjudication on the merits thereby precluding a subsequent action." ***Exxon Research and Engineering Co. v. Industrial Risk Insurers***, 341 N.J.Super. 489 (App.Div. 2001)

But, the judge did not sua sponte address Sparta's judicial estoppel violations. ***Bahrle***, supra. By dismissing the complaint on res judicata grounds, the judge used his orchestrated dismissal to deny petitioners' due process in both cases.

On appeal, petitioner presented the Appellate Division with his pleading (P46), his certification (P52), Sparta's admission that it argued exhaustion (P59), and a brief (P55) that quoted Standards of Review that should have resulted in its reviewing the four undecided issues. This evidence should have also resulted in a denial of summary judgment in the lower court.[17] Instead, the Appellate Division denied petitioner a meaningful appeal by not reviewing the recusal,[18] notice,[19] judicial estoppel,[20] and void judgment [21] issues. Moreover, it avoided the dismissal for exhaustion (P28-30) that ended jurisdiction so it could use the advisory opinions that the judge orchestrated to affirm res judicata (P8). Doing so proves a systemic denial of due process. So,

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[17] Under Rule 4:46-2 the court shall grant summary judgment if a discriminating search of the merits in the pleadings, depositions, and admissions on file, together with the affidavits submitted on the motion, clearly shows that there is no genuine issue of material fact requiring disposition at a trial.. ***Millison v. De Nemours***, 101 N.J. 161, 167 (N.J. 1985).

[18] ***Williams v. Runyon***, supra. (see fn. 33)

[19] ***Maul v. Kirkman***, supra. (see fn. 6)

[20] ***Bahrle v. Exxon Corp.***, supra. see fn. 4)

[21] "A party or privy is not precluded or estopped, however, from attacking a judgment which is void ab initio. Such a judgment amounts to nothing and has . . . no force as res adjudicata." ***Schwartz v. Battifarano***, 2 N.J. 478, 484 (N.J. 1949).

petitioners ask this Court to review this appeal as it relates to these issues and the questions presented.

The N.J. Supreme Court denied certification and reconsideration though required to remand to decide the issues previously raised but not decided.[22] Hence, the Appellate Division is the highest state court to have decided this case.

The foregoing shows Sparta successfully argued it did not have SDWA jurisdiction (P12). to achieve the 10/21/03 summary judgment order. In its 6/15/06 trial brief, it admitted to arguing exhaustion (P59). The judge affirmed the 10/21/03 order in his 7/21/04 judgment (P23) then dismissed the complaint for failure to exhaust SDWA remedies (P28-30) contrary to Sparta's original position, thus proving a judicial estoppel violation. The judge then dismissed with prejudice instead of without prejudice based on advisory opinions that he cannot render to make his decision appear to be on the merits (P34). So, the trial was a sham, nullified to aid a judicial estoppel violation, which constitutes impropriety or the appearance of it. ***Canon*** 2. The Appellate Division though aware of the foregoing facts avoided the judicial estoppel violation, the usurpation of power, Sparta's admitting exhaustion, and the dismissal for exhaustion so it could affirm res judicata based on advisory opinions rendered without a controversy. Doing so exposes petitioners to a legal fees sanction in order to conceal a systemic due process violation that involves the Appellate Division.

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[22] "The matter is remanded to address issues raised before but not addressed by the Appellate Division." ***Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.***, 179 N.J. 343 (N.J. 2004).

Reasons for Granting this Petition - R.14(h)

There are three reasons for granting this petition. First, the courts took property without compensation in proceedings intended to compensate for a taking. Second, federal questions were decided in a way that conflicts with relevant decisions of this Court. ***R***.10(c). Third, this Court's supervision is needed to review a systemic violation of due process.

The Appellate Division avoided 4 issues so it could affirm res judicata based on advisory opinions (P34) that could not be rendered since it dismissed for a lack of jurisdiction (P28-30) by not respecting the unreversed 10/21/03 order (P23). So, the Appellate Division knowingly deprived petitioners of "the only remedy ever available for the enforcement of its right to prevent the seizure of its property." [23]

The ***first*** undecided issue shows Sparta successfully violated judicial estoppel by arguing exhaustion to end the trial and petitioner's right to be heard.[24] The judge aided this violation by

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[23] "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." ***Brinkerhoff-Faris Tr. & Sav. Co. v. Hill***, 281 U.S. 673 (U.S. 1930).

[24] "When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be

overruling the law of the case to retroactively dismiss for exhaustion by nullifying the case that was presented. Sparta further violated judicial estoppel by arguing res judicata to bar petitioners from being heard on its previous judicial estoppel violation. The Appellate Division affirmed res judicata knowing Sparta admitted to arguing exhaustion, proving a systemic denial of due process by intentionally ignoring the exhaustion dismissal (***R.***4:37-2 d)). The ***second*** undecided issue shows the 7/21/04 judgment is void on its face by not respecting the law of the case in order to dismiss the complaint. Then further usurped his power by assuming hypothethical jurisdiction to render advisory opinions,[25] which he used to dismiss the complaint with prejudice, instead of without prejudice. Hence, he ended petitioners' right to the trial in the unreversed 10/21/03 summary judgment order, thus usurping the law of the case. In this case, the judge denied petitioner's recusal motion so he could enter res judicata based on the dismissal with prejudice that he orchestrated in the previous case, which shows the judge denied petitioners due process in

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heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678. ***Bouie et al. v. City Columbia***, 84 S. Ct. 1697, 378 U.S. 347 (U.S. 1964)

[25] This Court declines to endorse the "doctrine of hypothetical jurisdiction," under which several Courts of Appeals have found it proper to proceed immediately to the merits question, despite jurisdictional objections . . . That doctrine carries the courts beyond the bounds of authorized judicial action and thus offends fundamental separation-of-powers principles. In a long and venerable line of cases, this Court has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit. ***Steel Co. v. Citizens for A Better Environment***, 523 U.S. 83 (U.S. 1998).

both cases. His conduct was prejudicial to the administration of justice. The ***third*** undecided issue shows Sparta and the court never provided notice, thereby preventing petitioners from being heard before the court effectively overruled the law of the case. The ***fourth*** undecided issue shows the trial judge abused his discretion by denying recusal. That motion was based on the judge misrepresenting the SDWA issue instead of respecting the law of the case (***Canon*** 2) which he affirmed in his 7/21/04 judgment (P23). The judge's fabricated dismissal in the first case and his res judicata ruling based on that dismissal in the second, proves a structural error due to the judge's fundamental unfairness and unreliability. ***U.S. v. Gonzalez-Lopez***, supra.

By avoiding the foregoing, the Appellate Division denied rights, privileges, or immunities secured by the Constitution and laws of the U.S., and avoided its supervisory duties. ***Canon*** 3B.(a)&(b), thus requiring this Court to decide these matters. [26]

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[26] fn12 "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them . . . . **If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.**" Robb v. Connolly,111 U.S. 624, 637 (1884). See also Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 681 (1930). ***MCKesson Corp. v. Div. Alcoholic Beverages and Tobacco***, 110 S. Ct. 2238, 496 U.S. 18 (U.S. 1990); ***Wisconsin Central Limited v. Public Service Commission Of Wisconsin***, No. 96-1759 (7th Cir. 1996).

1. - **The 7/21/04 Void Judgment Issue**

The 7/21/04 judgment is invalid on its face.[27] Petitioner filed an inverse condemnation action based on the takings' clause [28] followed by a motion for summary judgment and Sparta's cross-motion. Petitioner's cause of action involves a property interest based on state and federal law.[29] The resulting 10/21/03 summary judgment order (P12) shows the trial court retained primary jurisdiction by deciding the SDWA did not statutorily apply to petitioner's lot so he ordered a trial.[30] That order is the law of the case.[31] Reconsideration of that order was denied on 11/26/03 (P36) and 2/26/04 (P40). The judge conducted a trial pursuant to the 10/21/03 order. Post-trial, the judge entered his 7/21/04 judgment (P14), which affirmed his 10/21/03 order (P23). Since the judge did not reverse that order he

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[27] " A judgment invalid on its face has consistently been held by our courts to be a nullity, "a blur on the record," and utterly void, not merely voidable. Westfield Trust Co. v. Court of Common Pleas, 115 N.J.L. 86 (Sup. Ct. 1935)." ***Garza v. Paone,*** 44 N.J.Super. 553, 561-562 (A.D. 1957).

[28] Northglenn v. Grynberg, 846 P. 2d 175, 178 (Colo. 1993) ("Because an inverse condemnation action is based on the 'takings' clause of our constitution, it is to be tried as if it were an eminent domain proceeding"). ***City of Monterey v. Del Monte Dunes at Monterey***, 526 U.S. 687 (1999)

[29] "A cause of action is a species of property protected by the Fourteenth Amendment Due Process Clause." Logan 455 U.S. at 428-9. ***Holman v. Hilton***, 712 F.2d 854 (3rd Cir. 1983); ***Maul v. Kirkman***, supra. (fn. 6).

[30] ***Loigman v. Township Committee***, supra. (see fn. 2).

[31] ***Lanzet v. Greenberg***, supra. (see fn. 3).

was required to respect it.[32] So, the unreversed 10/21/03 order barred him from reconsidering the law of the case.[33] Instead, he misrepresented [34] petitioners failed to exhaust SDWA adminstrative remedies [35] after his affirmation (***Canons*** 1-3). This misrepresentation prejudiced the administration of justice.[36] The foregoing usurpation of power renders

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[32] ***Sisler v. Gannett Co., Inc.,*** supra. (see fn. 12)

[33] If we construe the April 24, 1995 pre-trial ruling as a judgment as a matter of law in favor of the plaintiff, then the district court's post-trial reconsideration of that decision is barred by the law of the case doctrine. ***Williams v. Runyon***, 130 F.3d 568 (3d Cir. 1997).

[34] Black's Law dictionary defines a misrepresentation as, "Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead." BLACKS LAW DICTIONARY 903 (5th ed. 1979).

[35] "The doctrine of exhaustion of remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that **they would have to resolve the SDWA fifty foot radius issue before a building permit issued.**" (P28)

[36] "By misrepresenting events that occurred in court proceedings and in the court itself, respondent failed to treat other judges, litigants, attorneys, and court personnel with courtesy, respect, and honesty and thus undermined public confidence in the integrity of the judicial system. As the Supreme Court of Iowa recently observed, "a judge who misrepresents the truth tarnishes the dignity and honor of his or her office" because "[t]ruth and honesty lie at the heart of the judicial system, and judges who conduct themselves in an untruthful manner contradict this most basic ideal." In re Inquiry Concerning McCormick (Iowa 2002), 639 N.W.2d 12, 16.

the 7/21/04 judgment void.[37] Affirming the 10/21/03 order shows the judge knew exhaustion of SDWA remedies was futile.[38] So, the unreversed 10/21/03 order deprived the judge of jurisdiction to enter his 7/21/04 judgment.[39] Moreover, misrepresenting a fact to terminate a trial is shocking, it proves a substantive due process violation.[40] As does his

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And by engaging in conduct "that would appear to an objective observer to be unjudicial and prejudicial to the public esteem for the judicial office," respondent acted in a manner prejudicial to the administration of justice, as prohibited by DR 1-102(A)(5)." ***Disciplinary Counsel v. O'Neill***, 103 Ohio St.3d 204, 815 N.E.2d 286, 2004 -Ohio- 4704 (Ohio 2004).

[37] As the First Circuit has stated, "while absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction . . . Only in the rare instance of a clear usurpation of power will a judgment be void." Lubben v. Selective Service System, 453 F.2d 645, 649 (1972). ***Page v. Schweiker***, 786 F.2d 150 (3rd Cir. 1986)

[38] The exhaustion of remedies requirement set forth in R. 4:69-5 is "a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." . . . . However, "it is neither a jurisdictional nor an absolute requirement." Ibid. It will be waived as the interests of justice require, which has been held to mean that exhaustion of remedies will not be required where administrative review will be futile. ***Somerset Air Service, Inc. v. Twp. of Bedminster***, No. A-5311-05T2 (App.Div. 2007)

[39] The judgment of a tribunal lacking jurisdiction to enter such judgment is utterly void. ***Maguire v. Vanmeter***, 1 A.2d 445, 121 N.J.L. 150 (N.J. 1938)

[40] This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,'" ***Leonel***

dismissal for a lack of jurisdiction followed by advisory opinions which he cannot render that were used to dismiss with prejudice. Since the facts appear on the face of the 10/21/03 order and 7/21/04 judgment "there is no need to look beyond the face of the orders to determine their meaning." [41]

The judge's action parallels ***Bouie*** by overruling, not reversing, the 10/21/03 order that he entered and affirmed in his 7/21/04 judgment. Hence, he denied petitioner due process "in its primary sense of an opportunity to be heard and to defend [his] substantive right" [42] by retroactively annulling the case presented by petitioner's attorney for a lack of jurisdiction. Though ***Bouie*** is applied to criminal cases and procedural decisions overruled by supreme courts, this trial judge ururped his power to overrule the 10/21/03 order that he affirmed in order to terminate the trial, thus aiding Sparta's judicial estoppel violation. The very fact that he dismissed for exhaustion instead of rendering a decision on the merits further proves the judge is not impartial. [43]

Torres Herrara v. James A. Collins, 113 S. Ct. 853 (U.S. 1993)

[41] In re UNR Industries, Inc., 143 B.R. 506, 516 (Bankr. N.D. Ill. 1992) ("If an order is clear and unambiguous on its face, there is no need to look beyond the face of the order to determine its meaning."). ***Penn West Associates, Inc. v. Cohen***, 371 F.3d 118 (3d Cir. 2004)

[42] ***Bouie et al. v. City Columbia***, supra. (see fn. 24)

[43] "We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." . . . . The right to an impartial adjudicator, be it judge or jury, is such a right. Id., at 23, n. 8, ***Gray v. Mi ssippi***, 481 U.S. 648, 668 (U.S. 1987)

The judge dismissed the complaint for failure to exhaust SDWA administrative remedies and new theories, which improperly deprived him of jurisdiction.[44] Then, he assumed a hypothetical jurisdiction to reach the merits.[45] He also knowingly usurped his power by entering advisory opinions that he used as a decision on the merits in order to dismiss with prejudice, instead of the required dismissal without prejudice (***R.***4:37-2. d)). The Appellate Division in the previous case dismissed the appeal for failure to obtain a transcript though petitioner sought to appeal the dismissal for exhaustion that appears on the face of the 7/21/04 judgment, but not the trial transcript. It also ignored the exhaustion dismissal in this appeal so it could treat advisory opinions as rulings on the merits in order to affirm res judicata. However, this Court disapproves of advisory opinions and N.J. courts are without jurisdiction to render them.[46]

In this case, Sparta argued res judicata knowing its judicial estoppel violation nullified the trial ordered in the unreversed 10/21/03 order contrary to the law of ***Maul***, which was argued. Since petitioners were denied a "full and fair opportunity to litigate" the former case based on a

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[44] ***Pleasantville Taxpayers***, supra. (see fn. 13)

[45] ***Steel Co.***., supra. (see fn. 25).

[46] Hypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Muskrat v. United States, 219 U. S. 346, 362 (1911); Hayburn's Case, 2 Dall. 409 (1792). ***Steel Co. v. Citizens for A Better Environment***, 523 U.S. 83 (U.S. 1998); ***In re Determination by Dir. of the Div. of A.B.C***, supra. (see fn. 14)

lack of jurisdiction dismissal, res judicata does not apply.[47] If permitted to stand, the judge's 6/23/06 summary judgment order on res judicata and the appellate affirmation will have taken petitioner's lot, their right to be heard, the money spent for an attorney, and will expose petitioners to fees as the result of Sparta's fraud upon the court. So, the res judicata ruling and Appellate Division affirmation denied petitioners a new trial to enforce its rights thereby resulting in the seizure of its property.[48]

Brinkerhoff applies because the judge dismissed the complaint for failure to exhaust SDWA remedies after he affirmed the 10/21/03 order, which found the SDWA does not apply. He then rendered advisory opinions, for a subsequent dismissal with prejudice, which are barred by law. ***In re Determination by Dir.,*** supra. (See fn. 14). Thereby, "denying to it the only remedy ever available for the enforcement of its right", which required petitioners to file its independent action to have the 7/21/04 judgment set aside. ***R.***4:50-3. Then, the Appellate Division denied petitioners the process that was due by affirming res judicata instead of addressing the two improper dismissals in the judgment it reviewed. So "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction."

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[47] "Petitioners were not provided the "full and fair opportunity to litigate" the case below that is a prerequisite to application of principles of res judicata. Montana v. U.S., 440 U.S. 147, 153 (1979). " ***Syvasky Lafayette Poyner v. Edward W. Murray,*** 113 S. Ct. 2397 (U.S. 1993).

[48] ***Brinkerhoff-Faris Tr. & Sav. Co.,*** supra. (see fn. 23)

2. - The Notice Issue

Dismissing the complaint for exhaustion was a reversal of the position taken by the judge in his 10/21/03 (P12), 11/26/03 (P36) and 2/26/04 (P40) orders and his affirmation of the 10/21//03 order in his 7/21/04 judgment (P23).[49] So, the judge's lack of respect for the unreversed law of the case came, as a complete surprise to the petitioners who continue to rely on the unreversed law of the case.[50]

In this case, Sparta made the following admission to the trial court (P59), which proves a lack of candor (**RPC** 3.3(a)(1)&(2)); "The Maul case does not support plaintiff's' claim. Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." Sparta refers to the law of ***Maul,*** which requires notice before the law of the case could be changed. So, Sparta admitted to arguing exhaustion without moving to reverse the law of the case. Essentialy ***Maul*** required Sparta to file a motion pursuant to ***R.***4:49-2 within 20 days after service of the order to have it vacated. The N.J. Supreme Court extended ***R.***4:49-2 to include motions

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[49] "The Court, in the course of this litigation by Order of October 21, 2003, determined that the **SDWA 50 foot radius requirement applied rather to new or modified well water systems and not existing wells as in the case of plaintiffs' well." (P23) (emphasis added)**

[50] The order came as a complete surprise to the plaintiff as it was a reversal of the earlier position taken by the court . . Plaintiff relied, and had a right to rely, upon the ruling made at that time, as being the law of the case. ***Buckeye Powder v. E. I. Dupont De Nemours***, 248 U.S. 55 (U.S. 1918).

to vacate judgments and orders.[51] Motions shall be by notice of motion in writing unless the court permits it to be made orally. ***R.***1:6-2. Therefore, Sparta failed to provide petitioner with the notice required by the rules in order to have the law of the case vacated before exhaustion could be considered. So, its own admission shows it violated due process by not providing notice and an opportunity to be heard before the judge overruled the 10/21/03 summary judgment order by dismissing for exhaustion, then rendering advisory opinions in order to dismiss with prejudice.[52]

Sparta also successfully defended against petitioner's motions for reconsideration, so it further violated judicial estoppel since it successfully defended against these motions. This shows it knew it was required to provide a formal notice. Hence, Sparta was not candid with the court. (**RPC** 3.3(a)(1)&(2)). The Appellate Division also knew Sparta violated judicial estoppel since its admission was presented to them for review (P59). But, the Appellate Division avoided this issue by making the 7/21/04 judgment appear to be on the merits to affirm res judicata in order to cover up the misconduct of a municipal attorney and a judge.

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[51] ***Baumann v. Marinaro***, 95 N.J. 380 (N.J. 1984) (R. 4:49-2 was extended to vacations).

[52] "The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. See United States v. $8,850, 461 U.S. 555, 562, n. 12 (1983)." ***U.S. v. James Daniel Good Real Property et al.***, 510 U.S. 43, (U.S. 1993).

3. - The Judicial Estoppel Issue

The Appellate Division abused its discretion by not addressing the judicial estoppel violation admitted by Sparta, [53] which is especially egregious and the usurpation of the law of the case. So, this Court should exercise its judicial estoppel supervisory power since the appellate court denied petitioners a meaningful appeal in this manner.[54]

Failure to exhaust must be argued in the early stages of the case.[55] Sparta's cross-motion waived further jurisdictional arguments by achieving the 10/21/03 order.[56] That summary judgment order remains the law of the case.[57] As the law of the case, that order settled those issues for all subsequent stages of the suit.[58] So, Sparta willfully violated the

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[53] ***Bahrle v. Exxon Corp.***, supra. see fn. 4)

[54] "This court may raise judicial estoppel sua sponte in "especially egregious case[s] wherein a party has successfully asserted a directly contrary position." ***Beall v. U.S.***, 467 F.3d 864 (5th Cir. 2006); ***Grigson v. Creative Artists Agency***, 210 F.3d 524 (5th Cir. 2000); ***U.S. Philips Corp. v. Sears Roebuck & Co.***, 55 F.3d 592 (Fed. Cir. 1995); ***In re Cassidy***, 892 F.2d 637 (7th Cir. 1990);] ***Cathcart v. Flagstar Corp.***, 155 F.3d 558 (4th Cir. 1998); ***West Virginia Dep't of Transportation, Div. of Highways, A State Agency v. Robertson***, 618 S.E.2d 506, 217 W.Va. 497 (W.Va. 2005).

[55] The challenge to the authority of the court to entertain the action because of plaintiff's failure to exhaust administrative remedies should be disposed of at the threshold of the case. ***City of East Orange v. Twp. of Livingston***, 102 N.J.Super. 512 (Law Div. 1968).

[56] ***Schaser v. State Farm Ins. Co.***, supra. (see fn. 1)

[57] ***Lanzet v. Greenberg***, supra. (see fn. 3)

[58] ***Slowinski v. Valley National Bank***, supra. (see fn. 9)

unreversed 10/21/03 order by arguing exhaustion.[59] Taking a contrary position represents an intentional violation of judicial estoppel.[60] Arguing a new exhaustion theory also violates judicial estoppel.[61] The 7/21/04 judgment shows the judge affirmed his 10/21/03 order (P23), then overruled it to annul the trial, thereby depriving petitioners of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." [62] So, Sparta's judicial estoppel violation constitutes a fraud upon the court by violating the unreversed 10/21/03 order to begin its unconscionable scheme to prevent petitioner's attorney from fully and fairly presenting their case by having the trial annulled.[63]

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[59] ***Warren County Comm. Coll,*** supra. (see fn. 5)

[60] Reciprocal Merchandising Services, Inc. v. All Advertising Associates, Inc., 163 B.R. 689, 697 n.11 (S.D.N.Y. 1994) (finding that "intentional misconduct is a necessary element in a claim for judicial estoppel" even in bankruptcy context); ***Ryan Operations G.P. v. Santiam-Midwest Lumber Co.***, 81 F.3d 355 (3d Cir. 1996); ***Levin v. Robinson, Wayne & La,*** 246 N.J.Super. 167, 187 (L.D. 1990) (For purposes of judicial estoppel, a party makes intentionally inconsistent statements when he unequivocally asserts a position of law or fact in one proceeding and knowingly proceeds to assert a contrary position in a subsequent proceeding).

[61] ***Bahrle v. Exxon Corp.***, supra. (see fn. 4)

[62] ***Bouie et al. v. City Columbia***, supra. (see fn. 24)

[63] Another criterion for fraud upon the court is that the acts of the adverse party have to be such as prevent the losing party from fully and fairly presenting his case or defense . . . . Finally, to have a judgment set aside o the ground of fraud upon the court it is necessary to show that there was an unconscionable plan or scheme which was designed to influence the court in its decision. ***Moya v. Catholic Archdiocese of N.M.***, 755 P.2d 583, 107 N.M. 245 (N.M. Sup.Ct. 1988); ***Occhiuto v. Occhiuto***,

So, the judge's advisory opinion that followed his dismissal is based on a hypothetical jurisdiction. Sparta's violation took petitioner's money, as the property interest [64] paid to the attorney by terminating the trial thereby nullifying his presentation of petitioner's case, thus entitling petitioner to recover those monies and costs for a new trial. Petitioners are also entitled to damages by having to prosecute pro se to reinstate their rights.

Arguing res judicata in this case further violated judicial estoppel and is also a fraud upon the court for two reasons. First, it was intended to make its former judicial estoppel violation appear to have res judicata force, making it part of Sparta's continuing judicial estoppel scheme. Second, it wanted to deny petitioners a "full and fair opportunity to litigate" its ***R***.4:50-1 cross-motion, to keep petitioners from having the 7/21/04 judgment vacated. Sparta's certification in support of res judicata was a lie and a fraud upon the court since it only certifies copies of orders as being true copies, thus failing to meet the requirements of ***R***.1:6-6 on presenting facts to support the four prongs needed to

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625 P.2d 568 (Nev.Sup.Ct. 1981) Same); ***State Idaho v. Hightower***; 620 P.2d 783 (Id.Sup.Ct. 1980) (Same); ***MacDonald v. MacDonald*** , 552 N.E.2d 533 (Mass.Sup.Ct. 1990)(Same); ***Williams Services v. Sherman***, 492 N.W.2d 122 (S.D.Sup.Ct. 1992)(Same); ***Kawamata Farms Inc. v. United Agri Products***, 948 P.2d 1055 (Haw. 1997); ***Andrews v. Palmas De Majorca Condo.***, 898 So.2d 1066 (Fla.App. 2005); ***Davenport Recycling Associates v.a Comm. of I.R.S.***, 220 F.3d 1255 (11th Cir. 2000).

[64] Money -- is itself a legally protectible property interest. ***Dickman et al. v. Comm. I. R.S.***, 104 S. Ct. 1086, 465 U.S. 330, 336 (U.S. 1984)

prove res judicata.[65] So, its certification was a lie [66] and a misrepresentation since it does not have the basis that it states or implies for the assertion.[67] Hence, the judge's reliance on this certification was another misrepresentation since the facts asserted do not prove res judicata.

In its 6/15/06 trial brief, Sparta admitted; "The Maul case does not support plaintiff's' claim. Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." The trial court and Appellate Division abused its discretion by not sua sponte considering this a binding judicial admission that proves Sparta violated judicial estoppel to end

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[65] "In order for res judicata to apply, there must be (1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties, and (4) identity of the cause of action." ***In re Estate of Gabrellian,*** 372 N.J.Super. 432 (A.D. 2004).

[66] The certification was clearly a lie and constituted a fraud upon the court." . . . we stated that the filing of a false certification to induce a court to grant relief for an attorney's benefit is conduct that goes "to the heart of every attorney's obligation to uphold and honor the law." ***In re Reiss***, 101 N.J. 475, 491 (N.J. 1986).

[67] A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion. (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. Restatement (Second) of Contracts § 162. ***In re Allegheny International Inc.***, 954 F.2d 167 (3rd Cir. 1992).

this case.[68] This admission shows Sparta violated judicial estoppel [69] by arguing exhaustion while the 10/21/03 summary judgment order remains unreversed. So, failure to sua sponte review the admitted judicial estoppel violation creates an appearance of impropriety. (***Canon*** 2). Moreover, Sparta's attorney's admission proves misconduct because it actions were prejudicial to the administration of justice. ***RPC*** 8.4(a), (c) & (d).

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[68] Gospel Missions of America v. City of Los Angeles, 328 F.3d 548, 557 (9th Cir. 2003) (stating that court of appeals has discretion whether to treat a concession in a pleading or brief as a binding judicial admission). ***Berckeley Investment Group, Ltd. v. Colkitt***, 455 F.3d 195 (3d Cir. 2006)

[69] "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Pegram v. Herdrich, 530 U. S. 211, 227, n. 8 (2000); see 18 Moore's Federal Practice §134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding") . . . . . Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," Edwards v. Aetna Life Ins. Co., 690 F. 2d 595, 598 (CA6 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," United States v. McCaskey, 9 F. 3d 368, 378 (CA5 1993). . . . **judicial estoppel "is an equitable doctrine invoked by a court at its discretion,"** ***State of N.H. v. State of Maine***, 532 U.S. 742 (U.S. 2001).

Petitioner's certification (P53) states;

> The judge previously denied my motion for recusal. Then he subsequently denied me due process by allowing Sparta to violate judicial estoppel, by usurping his power, by depriving me of notice and the opportunity to be heard, and by dismissing my complaint for a want of jurisdiction by knowingly misrepresenting facts and law. **Though Sparta's violation of judicial estoppel preciptated the dismissal of my complaint, it was the judge's bias or gross incompetence that caused him not to estop the judicial estoppel violation and denial of notice.** Given his bad faith conduct, he should recuse himself so a fair and impartial judge can hear the motions. (emphasis added)

This certification sets forth a judicial estoppel violation, which raised a material issue of fact that should have prevented the entry of summary judgment. It should have prompted the judge to review the matter, especially since Sparta admitted to arguing exhaustion.[70] Therefore, the trial judge and subsequently the Appellate Division turned a blind eye to Sparta's admission and petitioner's certification,[71] in order to dispose of petitioners' case

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[70] ***Bahrle v. Exxon Corp.***, supra. (see fn. 4)

[71] This Court, however, cannot turn a blind eye to the allegations of the victims. ***In re Gallo***, 178 N.J. 115 (N.J. 2003)

thereby seizing petitioner's property and the right to be heard. So, the judge's failure to address an admission that proves judicial estoppel and his subsequent denial of the recusal motion proves "a high degree of favoritism or antagonism as to make fair judgment impossible." [72] Hence, the judge did not administer the law with an even hand by ruling in Sparta's favor.[73] Sparta's admission shows it only provided notice of its exhaustion argument, not the 10/21/03 order that had to be vacated, first.

For all of the foregoing reasons, the Appellate Division should have sua sponte reviewed the judicial estoppel issue, instead of just reading, but not addressing that argument. By not doing so, it knows its affirmation exposes petitioners to legal fees. Hence, it proves its willingness to do so, as opposed to ending misconduct by a Township, municipal attorney and a judge who will most likely subject others to such misconduct in the future because they know the Appellate Division will conceal their misconduct as it did in this case.

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[72] "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. ***Liteky v. U.S.***, 510 U.S. 540 (U.S. 1994)

[73] "Justice is the right of all men and the private property of none. The judge holds this common right in trust, to administer it with an even hand in accordance with law. A judge who does "favors" with his office is morally an embezzler. He is also a fool, for a judge who plays a "good" fellow for even a few must inevitably be stained with the reputation of a man who can be reached. " ***In re Mattera***, 34 N.J. 259, 275-276 (N.J. 1961).

4. – The Denial of the Recusal Issue

The Appellate Division abused its discretion by not recusing the trial judge for obduracy [74] and by not reversing his judgment. [75]

Petitioner's certification in support of his recusal motion states (P54);

> "He misrepresented facts and law by finding I failed to comply with the SDWA regulation which he knew to be untrue by not reversing the 10/21/03 order, which found the SDWA did not statutorily apply. This conduct amounts to an act of corruption because the judge misused his office to dismiss my complaint in Sparta's favor by misrepresenting facts and law."

The orders and judgment in this case show the judge entered the 10/21/03 order, denied reconsideration on 11/26/03 (P36) and 2/26/04 (P40) and affirmed his 10/21/03 order (P23). So, he knew it was not reversed. He was also barred from reconsidering that order by the law of the case,[76] and

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[74] "[i]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source." Liteky v. U.S., 510 U.S. 540, 563, 114 S. Ct. 1147, 1161, 127 L. Ed. 2d 474, 495-496 (1994). ***Panitch v. Panitch***, 339 N.J.Super. 63, (App.Div. 2001)

[75] We find under the circumstances of this case that the defendant's motion for recusal should have been granted. Therefore, the convictions must be reversed. ***State v. Tucker***, 264 N.J.Super. 549 (App.Div. 1993)

[76] ***Williams v. Runyon***, supra. (see fn. 33)

was required to respect it.[77] Comparing these facts to petitioner's certification shows petitioner's allegations were supported by facts known by judge to exist.[78] It proves an extrajudicial [79] bias by misrepresenting facts that are part of court proceedings.[80] His failure to recuse was prejudicial to the administration of justice.[81]

The void judgment argument shows the judge ended his jurisdiction by finding petitioners failed to exhaust SDWA remedies. After his jurisdiction ended, he assumed hypothethical jurisdiction in order to render advisory opinions that he used as merits rulings in order to dismiss with prejudice,

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[77] ***Sisler v. Gannett Co., Inc.***, supra. (see fn. 12)

[78] "It is not only unnecessary for a judge to withdraw from a case upon a mere suggestion that he is disqualified: it is improper for him to do so unless the alleged cause of recusal is known by him to exist or is shown to be true in fact. Clawans v. Schakat, 49 N.J. Super. 415, 420-21 (App.Div.1958)." ***Hundred East Credit Corp. v. Eric Schuster Corp.***, 212 N.J.Super. 350 (App.Div. 1986)

[79] Only bias which is personal or extrajudicial in nature is disqualifying. Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980. ***U. S.. v. Vespe***, 868 F.2d 1328 (3rd Cir. 1989)

[80] ***Disciplinary Counsel v. O'Neill***, supra. (see fn. 36)

[81] "The standards of conduct for judges are found in various sources. The removal statute refers only to "misconduct in office, wilful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence." N.J.S.A. 2A:1B-2. Our Rules go beyond the statute, identifying the following as subject to discipline: misconduct in office, wilful failure to perform duties, incompetence, habitual intemperance, engagement in partisan politics, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. " ***In re Alvino***, 100 N.J. 92, fn.3 (N.J. 1985).

instead of without prejudice (***R***.4:37-2.d)). So, the former trial was before a biased judge who denied petitioner's recusal motion in that case (P4).[82] Then, sua sponte orchestrated a dismissal with prejudice, which provided the basis for res judicata in this case. Then, in this case, he dismissed the complaint on res judicata grounds based on a dismissal, which he orchestrated without jurisdiction in the former case, proving an extrajudicial bias.[83] Therefore, the judge's actions in both cases are interwoven because they were intended to end the trial, deny petitioners' right to a new trial, and also deny him the right to be heard.[84] This conduct proves unfairness and unreliability on the judge's part,[85] which should prompt a structural error reversal.

The Appellate Division also denied petitioners a fair hearing [86] by not addressing the denial of the recusal motion for an abuse of discretion. ***Panitch,*** supra.

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[82] Under our cases, a constitutional error is either structural or it is not. ..... in Tumey v. Ohio, 273 U. S. 510 (1927), where we reversed the defendant's conviction because he had been tried before a biased Judge. ***Neder v. U.S.***, 527 U.S. 1 (U.S. 1999)

[83] ***United States v. Vespe***, supra. (see fn. 79)

[84] If meanwhile she was denied a fair hearing under state law, an important question of procedural due process is raised under the Fourteenth Amendment ***Tarver v. Smith,*** 402 U.S. 1000, 1003 (U.S. 1971)

[85] The touchstone of structural error is fundamental unfairness and unreliability. ***U.S. v. Gonzalez-Lopez***, 126 S.Ct. 2557 (U.S. 2006).

[86] Black's defines fair hearing as "a judicial or administrative hearing conducted in accordance with due process." 7th Edition,

CONCLUSIONS

The municipal attorney and the judge below wasted petitioners' resources by conducting a trial that it terminated for exhaustion contrary to the law of the case. The judge then usurped his power dismissed it with prejudice based on advisory opinions that it is not empowered to enter, thus rendering the monies spent on their attorney, a waste, while using taxpayer money to fund their misconduct. Doing so supports the inference that they violated due process to achieve a dismissal and to deplete resources with the expectation that its conduct would prevent further litigation by ordinary citizens who need legal representation. In order to bring this matter to this Court's attention, petitioner had to pro se deal with appeals that were denied in order to mislead and discourage further action in order to conceal a systemic due process violation. So, petitioner has spent countless hours to find and quote straightforward rulings to prove intentional misconduct of state law. Law that effectively protects the very rights that are set forth in the federal law that was quoted in order to prove they decided important federal questions in a way that conflicts with relevant decisions of this Court.

For all of the above stated reasons this petition should be summarily granted.

APPENDIX

Filed Jun 23, 2006

LADDEY, CLARK & RYAN, LLP
60 Blue Heron Road
Sparta, New Jersey 07871-2600
(973) 729-1880
Attorneys for Defendants/Respondents,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-1106-06
CIVIL ACTION - ORDER

NELSON & JOAN FERNANDES, PRO SE,
Plaintiffs,
vs.
SPARTA TOWNSHIP COUNCIL,
SPARTATOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Defendants.

THIS MATTER having been opened to the Court by Laddey, Clark & Ryan, LLP attorneys for defendants, Sparta Township Council, Sparta Township Manager and Sparta Township Engineer, Angelo J. Bolcato, Esq., appearing, on a motion seeking Summary Judgment and plaintiff, elon Fernandes, Pro Se, appearing in opposition to the motion and having filed a cross-motion for summary judgment and (two illegible handwritten words) and recusal; and the court having considered the the papers and arguments submitted in support of and in opposition to the motion and on the cross-motions

IT IS on this 23 day of June, 2006 ORDERED:

1. The plaintiffs Complaint is dismissed in its entirety with prejudice.

2. A copy of this Order shall be served upon all parties within seven (7) days of its receipt by counsel for defendants, Sparta Township Council, Sparta Township Manager and Sparta Township Engineer.

"s/Hon. B. Theodore Bozonelis A.J.S.C."

Opposed, Statement of Reasons Attached

Statement of Reasons
Fernandes v. Sparta Township
MRS-L-1106-06

The procedural history of this matter is detailed in the Court's written opinion and Judgment dated July 21, 2004 which is incorporated herein by reference, copy attached, and specifically pages 10 and 11. The procedural history was then supplemented as shown in the Certification of Angelo J. Bolcato, Esq. dated May 25, 2006, copy attached without exhibits.

That procedural history and the Court's written opinion more than evidences the fact that plaintiffs complaint Docket No. L-1106-06 is barred by the doctrine of res judicata as to the same issues raised. See In re Estate of Gabrellian, 372 NJ Super 432, 446 (App. Div. 2004); and **by the doctrine of collateral estoppel in an attempt to relitigate this matter,** see Monek v. So. River, 354 NJ Super 442, 454 (App. Div. 2002); and by the doctrine of the entire controversy as to preclusion of omitted claims now being raised, see DiTrolio v. Antiles, 142 NJ 253, 268 (1995).

Accordingly, summary judgment is granted pursuant to R.4:6-2(e)and R. 4:46-1 as to matters raised outside the pleading in the procedural history and Judgment previously entered. Resort to R.4:50 may not be used as a substitute for appeal as plaintiff attempts herein, see, In re Estate of Schifftner, 385 NJ Super 37, 43 (App. Div. 2006).

Plaintiff's cross-motion for summary judgment is denied for the above reasons and the motion for recusal is denied under R. 1:12-2 as being, without merit and based on dissatisfaction with the Court's rulings.

Previous motions for recusal have also been denied. There is no bias in favor of or against either party. Mr. Fernandes as a pro se has always been professional and respectful in his appearances in Court. He simply disagrees and does not accept any Court rulings in this matter as evidenced by the extensive procedural history. There is no basis for recusal.

05/25/06

LADDEY, CLARK & RYAN, LLP
60 Blue Heron Road
Sparta, New Jersey 07871-2600
(973) 729-1880
Attorneys for Defendants / Respondents, Sparta

CERTIFICATION OF ANGELO J. BOLCATO, ESQ.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — MORRIS COUNTY
DOCKET NO. L-1106-06
CIVIL ACTION

NELSON & JOAN FERNANDES. PRO SE
Plaintiffs,
VS.
SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Defendants.

Angelo J. Bolcato, hereby certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and fully familiar with the facts of this matter.
2. Attached as Exhibit A is a true copy of the Complaint filed December 28, 1999.
3. Attached as Exhibit B is a true copy of the Trial Court's Judgment and Opinion dated July 21, 2004 dismissing plaintiffs' Complaint.
4. Attached as Exhibit C is a true copy of the

September 16, 2004 Order denying plaintiffs' first Motion for Reconsideration.

5. Attached as Exhibit D is a true copy of the October 15, 2004 Order denying plaintiffs' second Motion for Reconsideration.
6. Attached as Exhibit E is a true copy of the Notice of Appeal dated Nov. 1, 2004.
7. Attached as Exhibit F is a true copy of the Motion dated Nov. 1, 2004 filed with the Notice of Appeal.
8. Attached as Exhibit G is a true copy of the Dec. 21, 2004 Order denying plaintiffs' Motion.
9. Attached as Exhibit H is a true copy of plaintiffs' Brief in support of their Motion for various relief dated January 14, 2005.
10. Attached as Exhibit I is a true copy of the March 4, 2005 Order denying Plaintiffs Motion.
11. Attached as Exhibit J is a true copy of the Appellate Division's May 3, 2005 Order.
12. Attached as Exhibit K is a true copy of plaintiffs' Brief dated June 6, 2005 seeking various relief.
13. Attached as Exhibit L is a true copy of the Order dated July 28, 2005 denying plaintiffs' motion.
14. Attached as Exhibit M is a true copy of the Appellate Division's Sept. 27, 2005 Order dismissing plaintiffs Appeal.
15. Attached as Exhibit N is a true copy of plaintiffs' November 1, 2005 Motion for Reconsideration.

16. Attached as Exhibit O is a true copy of the Dec. 8, 2005 Order denying plaintiffs' Motion.
17. Attached as Exhibit P is a true copy of the Supreme Court's February 7, 2006 Order denying plaintiffs' Petition for Certification.
18. Attached as Exhibit Q is a true copy of the Supreme Court's March 14, 2006 Order denying plaintiffs' Motion for Reconsideration.
19. Attached as Exhibit R is a true copy of plaintiffs' Notice of Second Motion for Reconsideration dated March 25, 2006.
20. As of this date, we have not received an Order concerning plaintiffs' Second Motion for Reconsideration.

I respectfully submit this Certification in support of the Sparta Township's Motion to Grant Summary Judgment dismissing the Complaint.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

"s/Angelo J. Bolcato"

06/14/07

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6309-05T1

NELSON and JOAN FERNANDES,
Plaintiffs-Appellants,
v.
SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER, and
Defendants-Respondents.

Submitted April 18, 2007 – Decided June 14, 2007
Before Judges Wefing and Yannotti.

On appeal from Superior Court of New Jersey, Law Division, Morris County, No. L-1106-06.

Appellants filed pro se brief.

Laddey, Clark & Ryan, attorneys for respondents (Angelo J. Bolcato, on the brief).

PER CURIAM

Plaintiffs appeal from a trial court order granting summary judgment to defendants. After reviewing the record in light of the contentions advanced on appeal, we affirm.

In 1988 plaintiffs purchased a vacant lot in Sparta known as Block 149,Lot 1. Prior to closing, they were in receipt of a survey which disclosed the existence of a storm water drainage pipe and a well

pumphouse. The deed plaintiffs received at closing reserved to The Lake Mohawk-Sparta Water Company a perpetual easement to operate, maintain, repair and replace the well pumphouse, mains and distribution pipes. The Township of Sparta subsequently took over The Lake Mohawk-Sparta Water Company and succeeded to its rights under this easement.

In 1990 plaintiffs began to explore the possibility of developing the lot, but they did not actively pursue the idea. In 1999 they had the property surveyed with an eye to potential development. Plaintiff Nelson Fernandes met with the Township Engineer to discuss the ramifications of the drainage pipe and well pumphouse in terms of future development of the lot, and he was pointed to the Safe Drinking Water Act, N.J.S.A. 58:12A-1 to -37, particularly the regulation that all land within a minimum of fifty feet from a new or modified well water system be N.J.S.A. 58:12A-1 to acquired or controlled by the owner of the public community water supply system. N.J.A.C. 7:10-11.7(b)1. Nelson Fernandes reviewed the applicable statute and regulations without consulting with counsel, and he came to the same conclusion. Neither Nelson Fernandes nor the Engineer realized this regulation did not bear upon plaintiffs' situation because the well, having been built in 1937, did not fit within the statute.

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N.J.A.C. 7:10-11.1. Based upon that erroneous reading of the statute and regulations, plaintiffs' application for a building permit was denied.

Plaintiffs did not appeal that denial. Rather, Nelson Fernandes met with the Township Manager to discuss the situation. The Manager subsequently

wrote to plaintiffs, indicating that perhaps the Township could be flexible with regard to the fifty-foot requirement. Rather than pursuing that avenue, plaintiffs filed an inverse condemnation action in 1999. That matter was tried before Judge Bozonelis, and on July 21, 2004, he filed an order and eleven-page written opinion dismissing plaintiffs' suit. Plaintiffs filed two motions for reconsideration, both of which were denied. Plaintiffs then appealed to this court, but their appeal was dismissed for lack of prosecution. Their attempts to obtain review in the Supreme Court were also unsuccessful.

In April 2006 plaintiffs filed the present action in which they assert the same claims which they unsuccessfully pressed in their 1999 suit.Defendants moved for summary judgment, which Judge Bozonelis granted. Plaintiffs have appealed from that
order.

Having reviewed the record, we are satisfied the order granting summary judgment to these defendants should be affirmed

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substantially for the reasons stated by Judge Bozonelis in his statement of reasons appended to the order of June 23, 2006.
Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my ofifce
Clerk of the Appellate Division

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Filed : Oct. 31, 2007

SUPREME COURT OF NEW JERSEY
C-284 September Term 2007
61,586

ON PETITION FOR CERTIFICATION

NELSON and JOAN FERNANDES,
Plaintiffs-Petitioners,

v.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER and
SPARTA TOWNSHIP ENGINEER,
Defendants-Respondents.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6309-05 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 30th day of October, 2007.

"S/CLERK OF THE SUPREME COURT"

Filed on Oct. 21, 2003

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY
DOCKET NO. MRS-L-3901-99
CIVIL ACTION - ORDER

NELSON FERNANDES and
JOAN FERNANDES, Pro Se
Plaintiffs,
vs.
SPARTA TOWNSHIP COUNCIL
SPARTA TOWNSHIP MANAGER
SPARTA TOWNSHIP ENGINEER
And THE NEW JERSEY
DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Defendants

THIS MATTER having been opened to the Court by plaintiffs, Nelson and Joan Fernandes, on a motion for summary judgment; and Laddey, Clark & Ryan, attorneys for defendants, Sparta Township Council, Sparta Township Manager and Sparta Township Engineer, appearing in opposition to plaintiff's motion and in support of defendants' cross-motion for partial summary judgment; and the Court having considered the papers submitted and oral argument in support of and in opposition to the motions:

IT IS on this 21st. day of OCT., 2003, ORDERED:

1 Plaintiffs' motion for summary judgment is denied.

2. **Defendants' cross-motion for summary judgment is granted, limited to and only to the extent that the Court finds that the *New Jersey Safe drinking Water Act,* including, but not limited to N.J.A.C. 7:10-11.1, does not statutorily apply, retroactively or otherwise, to defendants' well located on plaintiffs' property.**

3. Plaintiffs' other claims of estoppel and as they relate to estoppel, nuisance, temporary taking and fair dealing present material facts in issue for trial.

4. **Trial is scheduled for January 12, 2004.**

5. Although the parties consent, the Court will not certify paragraphs 1 and 2 of this Order as a final judgment as no affirmative relief is granted thereunder susceptible to enforcement, and material facts continue in issue for trial as stated in paragraph 3.

"s/B. Theodore Bozonelis A.J.S.C."

STATEMENT OF REASONS

Stated on the record and pursuant to R.4:42-2
with Pressler's Comments to the Rule.

SUPERIOR COURT OF NEW JERSEY
MORRIS/SUSSEX VICINAGE

Chambers of
B. Theodore Bozonelis
Assignment Judge

Courthouse
P.O. Box 910
Morristown, New Jersey, 07960-0910
Tel: (973) 656-4020
Fax: (973) 631-6409

July 21, 2004

Mr. and Mrs. Nelson Fernandes
9 Fox Run
Denville, New Jersey 07834

Avrom J. Gold, Esq.
Mandelbaum, Salsburg, Gold,
Lazris, Discenza & Steinberg, P.C
155 Prospect Avenue
West Orange, NJ 07052

Brian M. Laddey, Esq.
Laddey, Clark & Ryan
60 Blue Heron Road
Sparta, NJ 07871-2600

RE: Fernandes v. Sparta Township, et al.
Docket No. MRS-L-3901-99

Dear Counsel and Mr. Fernandes:

Following trial in the above matterthe Court was advised by Mr. Fernandes and Mr. Gold that plaintiffs will no longer be represented by Mr. Gold. Accordingly, the Court is forwarding the within

Opinion on its findings of fact and conclusions of law to both Mr. Fernandes and Mr. Gold, trial counsel of record for plaintiffs, as well as Mr. Laddey, counsel for defendants. The Opinion of the Court follows with enclosed Order entered this date and represents the Court's final decision on this matter. The July 29, 2004 Court date is no longer scheduled.

Filed July 21, 2004
Entered on ACMS

PREPARED BY THE COURT
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY
DOCKET NO. MRS-L-3901-99
CIVIL ACTION - JUDGMENT

NELSON FERNANDES and
JOAN FERNANDES, Pro Se
Plaintiffs,
vs.
SPARTA TOWNSHIP COUNCIL
SPARTA TOWNSHIP MANAGER
SPARTA TOWNSHIP ENGINEER
And THE NEW JERSEY
DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Defendants.

The within matter having been tried before the Court on June 21, 22, 23, 2004 and July 8, 2004 and Avrom J. Gold, Esq., Mandelbaum, Salsburg, Gold, Lazris, Discenza & Steinberg, P.C. representing the plaintiffs at trial, and Brian M. Laddey, Esq., Laddey, Clark & Ryan, Esqs. representing the defendants at trial, and the Court having rendered its findings of fact and conclusion of law by written Opinion on July 21, 2004, and for good cause shown,

IT IS ON THIS 21st DAY OF JULY, 2004

ORDERED that Judgment is entered in favor of defendants and against plaintiffs and plaintiffs' **Complaint is dismissed with prejudice** and without costs for the reasons set forth, in this Court's written Opinion of even date herewith.

"s/B. Theodore Bozonelis"
Judge of the Superior Court
Assignment Judge

Findings of Fact

Plaintiffs are the owners of Block 149, Lot 1 in Sparta Township. They allege that the lot has been taken by the Township without just compensation under a claim of inverse condemnation.

The property is in the Lake Mohawk Country Club Section of Sparta Township. It is bounded on the west by Indian Trail, a street owned by the Lake Mohawk Country Club, on the south by Church Lane (a paper street) and on the east by Alder Drive now utilized by the municipal sewer treatment plant. The lot is in an R-3 zone, in which the principal permitted use is single family dwellings.

Plaintiffs contracted to purchase the property on May 17, 1988. The Contract of Sale (P-51) was conditioned in part on the fact that no easements existed which would impair construction on the site and on obtaining a building permit for a single family dwelling and on obtaining a variance if required. The Contract was also conditioned on a satisfactory perc test to obtain a building permit. Thereafter, plaintiffs conducted perc tests on the property and retained a professional engineer who designed a septic system for a proposed four bedroom house on the parcel. The plot plan showing the location of the house and septic system was dated September 7, 1988 and filed with the Sparta Township Health Department on October 26, 1988 (J-1).

The septic plan shows that the survey information was supplied by William R. McGinty, P.E. Sparta NJ October 30, 1980. That survey (P-39) shows the location of a well pumphouse and an

existing fifteen inch storm water drainage pipe discharging into the parcel off Indian Trail in the northwest corner of the property and in the general vicinity of the well pumphouse. Accordingly, the plaintiffs' either were on notice or through their engineer had constructive notice of both the stormwater drainage pipe and the well pumphouse prior to closing of title on April 6, 1989.

Their knowledge is further confirmed by a May 8, 1989 letter from The Lake Mohawk Country Club, the owner of Indian Trail to plaintiffs (P-25) which enclosed a letter from its own engineer who inspected the property. That letter references correspondence from plaintiffs regarding drainage on the lot dated March 26, 1989, prior to closing of title, and specifically discusses drainage from the east side of Indian trail from the crest of the hill carried in a paved gutter across

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Alder Terrace to the northwesterly corner of the lot. It states that the paved swale deposits the storm drainage on the lot with the well pumphouse approximately forty feet southeast of the end of the paved swale. The Lake Mohawk Country Club engineer further recommends that plaintiffs, as contract purchasers, prepare engineering drawings indicating how the storm drainage will be redirected as part of their development subject to the Country Club's approval.

Prior to the March 26 and May 8, 1989 exchange of correspondence, plaintiffs had received a November 16, 1988 letter from the Sparta Township Health Officer indicating that plaintiffs' septic system application was completed

and appeared that it would be approved. Further, that correspondence advised of a sewage treatment plant next to plaintiffs' parcel; it expressed concern as to the construction of a home directly next to a sewage treatment plant and that, as prospective owners, plaintiffs should acknowledge that they were not only aware of the plant, but also that it would be enlarged and upgraded within the next two years. The Township requested that plaintiffs acknowledge those facts in a letter to the Township.

Thus, as contract purchasers, prior to closing of title, plaintiffs knew that the parcel had a storm water drainage issue off Indian Trail, a well pumphouse and that the lot was located next to a sewage treatment plant which would be enlarged and upgraded within two years. They knew further from their septic plan that the parcel could support a single family dwelling with a septic system. When plaintiffs closed title on April 6, 1989, they did so without completion of the Contract conditions of obtaining a building permit for a single family dwelling and a variance if required. They waived those conditions as the same merged into the closing of the title.

At closing, the deed (P-53) for the lot reserved to The Lake Mohawk — Sparta Water Company its successors and assigns, a perpetual easement to maintain, operate, repair and replace the existing well pumphouse together with all mains and distribution pipes for water supply purposes and the right of access and egress for all such purposes. The deed was also subject to State, County and Municipal laws and regulations governing the use of the premises, to restrictions and easements of record and to such state of facts as may be

disclosed by an accurate survey. The Township of Sparta, as part of a takeover of the water supply system for the Township, acquired the well pumphouse and access easement from The Lake Mohawk Sparta Water Company in July, 1987.

Thereafter on July 10, 1990, plaintiffs wrote to the Sparta Township Manager, David J. Ferguson (P-11) with a request to tie into the sewer treatment plant being built on Alder Drive for the proposal of building a single family

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dwelling on the lotThe letter outlines the configuration of the house on the lot and details the size and design. The tie into the sewer system of a proposed dwelling would have avoided the considerable cost of a septic system. In response, Mr. Ferguson forwarded a letter to plaintiffs dated August 16, 1990 (P-14) which referenced a discussion with plaintiffs and indicated that the Township perceived no problems for plaintiffs proposed dwelling to connect to the new sewage treatment plant once it was on line. Further, the correspondence indicated that the Township was agreeable to extend the septic system approval previously obtained for six months until the issue regarding the sewer connection was resolved. If plaintiffs could not connect, they could have a six month period to implement the septic permit.

However, plaintiffs did not seek to obtain a building permit and develop the lot for the next nine years No evidence exists that there was any impediment to their doing so. As shown, the Township was assisting them, had approved a septic system for a single family dwelling, and was working with them to tie into the sewerage

system. Testimony from plaintiff, Nelson Fernandes, indicated that plaintiffs were involved in other pursuits and simply did not seek to take steps to develop the lot until 1999, nine years later.

At that time, plaintiffs obtained a survey of the property from William F. Stoehr (P-68) dated May 12, 1999 which evidenced an 18 inch storm water drainage pipe in the northwesterly corner replacing the previous fifteen inch pipe and that the storm water flows into the property but away from the well pumphouse. It further showed the easement roadway to the well pumphouse coming off the corner of Church Lane and Indian Trail and the Sewer Treatment Plant into Alder Drive. Plaintiff, Nelson Fernandes, then shortly thereafter, in May, 1999, met with the Township Engineer and Director of Public Works, Charles Ryan, to review a proposed minor subdivision plat for two building lots on the property.

At that meeting, Mr. Ryan made reference to New Jersey's Safe Drinking Water Act (SDWA), NJSA 58:12A-1 et seq adopted in 1977. Under that Act, regulations promulgated for the protection of groundwater resources in 1985 mandated, among other requirements, that all land within a minimum of fifty feet (50 ft.) from a new or modified well water system shall be acquired or controlled by the owner of a public community water supply system and no potential source of contamination shall be permitted to exist within that area. See N.J.A.C. 7:10- 11.7(b)2. The regulations were thereafter amended in 1996 to change the language to require the owner of a public community water system to both acquire and control the fifty foot radius. The amended regulation also specifically barred storm lines in

the fifty foot radius and would be relaxed only by the Department of

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Environmental Protection and only if the well is constructed in a confined acquifer. The well on plaintiffs' property is not in a confined acquifer and was not a new or modified well having been built in 1937. Accordingly, the SDWA fifty foot radius requirement did not apply.

Despite these facts, **Mr. Ryan, in good faith, mistakenly believed that the SDWA applied to the existing well on plaintiffs property and advised Mr. Fernandes that the Township controlled a fifty foot radius around the well. The Court, in the course of this litigation by Order of October 21, 2003, determined that the SDWA 50 foot radius requirement applied rather to new or modified well water systems and not existing wells as in the case of plaintiffs' well. Also in the course of this litigation, through motion practice, the State of New Jersey Department of Environmental Protection has confirmed by letter dated October 16, 2003 that the SDWA 50 feet radius requirement would not be applied herein.**

However, compounding that mistaken belief by Mr. Ryan as to the fifty foot radius requirement, plaintiff Nelson Fernandes reviewed the SDWA and regulations himself without consulting an attorney and came to the same conclusion. In this regard, he also confronted Mr. Ryan on why The Lake Mohawk Country Club storm water drainage pipe was allowed to drain into the fifty foot radius as the SDWA provided that potential

contaminants were to be excluded within the radius. According to plaintiff, Mr. Ryan indicated that he had more important problems to attend to in his position, i.e., "bigger fish to fry". In fact, Mr. Ryan's testimony revealed that despite his mistaken belief that a fifty foot radius requirement applied, the Township never sought to enforce it against any landowners.

The testimony of plaintiff Nelson Fernandes is that he next pursued a building permit with the Construction Official of Sparta Township. He testified that he handed the official an application for a building permit but that it was rejected because the fifty foot radius issue needed to be resolved. In this regard, the Construction Official handed Mr. Fernandes a May 19, 1999 Memorandum from the Township Engineer, Mr. Ryan, (P-15). The Memorandum was addressed to the Construction Official and referenced plaintiffs' property. It stated that Sparta's public community water supply well No. 1 was on the parcel and Sparta had easement rights by deed. It further stated that under the SDWA regulations, a fifty-foot radius of control must be maintained around the well and he should have an opportunity to comment on the plaintiffs' plans prior to a construction permit issuance.

Plaintiffs did not appeal the decision of the Construction Official to reject their application for a building permit. Instead, Mr. Fernandes had a June 28, 1999

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meeting with the Township Manager, Mr. Ferguson. He discussed the SDWA and his belief that, under the regulations, the Township had to

acquire and control the fifty-foot radius. The substance of their discussions on June 28, 1999 were summarized by Mr. Ferguson in a letter of July 2, 1999 (P-16) to Mr. Fernandes. The letter summarized four issues: (1) while the Township desired establishment of a fifty foot easement around the well, its position was that this did not render the property unbuildable, (2) the storm water drainage system maintained by Lake Mohawk Country Club should be diverted to stop the flow of water into the well field and that the issue would be raised by the Township with the Club to discuss what measures the Club could take, (3) the ownship anticipated abandoning the well in three to four years, and thereafter, the easement Thereon, and (4) consideration would be given to the Township purchasing the parcel, but that this was not an offer to purchase. Mr. Ferguson also stated that while the subdivision of the lot might be possible, it was not desirable because of the close proximity to the sewage plan and the odor problems. In fact, the sewerage treatment plant has now been expanded into Alder Drive and is much closer to plaintiffs' parcel.

Thereafter, Mr. Ferguson met with Mr. Fernandes on July 19, 1999 and confirmed the substance of their discussions in a letter to him on July 20, 1999 (P-18). That letter indicated that the Township would give some consideration to being flexible regarding the fifty foot radius. Mr. Ferguson requested that plaintiffs prepare a site plan indicating the location of the house and other facilities with a request that it be located as far as possible from the well. Upon receipt of the plan, the Township would consider the proposal to work out a compromise which would protect the well

and allow plaintiffs to build.

Plaintiffs however did not pursue the building permit. Rather, based upon their own mistaken belief that not only did the SDWA 50 foot radius requirement apply to their well, but also that the Township could not relax those standards, they chose instead to file a Complaint in Lieu of Prerogative Writs claiming a taking by the Township under inverse condemnation. They did not seek the advise of counsel. In effect, plaintiffs chose to believe the Township that the SDWA fifty foot radius requirement applied to their well but chose not to believe the Township when the municipality was willing to relax that requirement and allow them to build.

It was plaintiffs' own interpretation of the SDWA and not the Township's interpretation that construction was prevented by the SDWA fifty foot radius requirement. As a result, plaintiffs claimed that either a subdivision with two homes could not be obtained or a single family dwelling could not be desirably located on the lot with a lake view rather than a view toward the sewerage treatment plant. Under that claim, they argue that their property was taken without

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just compensation. Further, they argue in this regard that the Township had knowledge of the SDWA and regulations and should have advised them of the same and the Township's belief that they applied at the time of their purchase in 1989. More specifically plaintiffs also claim that the Township had invaded their use and enjoyment of their property by permitting the Lake Mohawk Country Club to discharge its storm water into the

fifty foot radius of the well the Township acquired since 1987. They claim the Township Engineer knew or had constructive knowledge since 1987 that under the SDWA, if the Township took the position it applied, the plaintiffs were prohibited from entering the 50 foot radius to construct a drainage facility and build on the lot. Plaintiffs assert that by the Township failing to disclose these facts, they have been denied all beneficial use of their land from the date of purchase. Further, plaintiffs claim that the Township knew of the drainage pipe since 1987 by its routine inspections of the well pumphouse and/or by an earlier subdivision application filed by an Edward J. Fitzpatrick in 1980 before the Township Planning Board regarding their property.

Exhaustion of Administrative Remedies

There is a lack of material relevant evidence to support the argument that plaintiffs would not have purchased the lot if they knew the Township would have applied the 50 foot radius requirement under the SDWA. Rather, the evidence presented supports the fact that at the time of their purchase and a year later in 1990, the Township had approved a septic plan and was assisting plaintiffs to hook into the sewer line to avoid the costs of a septic system. There is no evidence to show that there were any impediments to plaintiffs developing the property under their plan for a single family dwelling. The Township never made any statements to them in that regard or any statements that the SDWA applied at that time. Plaintiffs theorize instead that the Township's mistaken belief that the SDWA applied to plaintiffs' well relates back to the Township's

takeover of the well in 1987 and should have been communicated to them at the time of purchase. Thus, they would not have bought the property because if purchased, they would have been prevented from development of a single family dwelling thereon and/or subdivision building lots.

Plaintiffs' analysis is not supported by the evidence and is without merit on the basis of a failure to exhaust administrative remedies. First, as to the time period from the date of purchase in 1989 to 1999 the Township never directly or indirectly indicated to plaintiffs that a building permit could not be obtained or that the SDWA applied in any respect. Second, as to the time period of 1999, while the Township Engineer indicated to plaintiffs that the SDWA applied and that the

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Township must control a 50 foot radius around the well, the Township Manager indicated flexibility as to the radius requirement, a willingness to compromise and that the lot was buildable. Plaintiffs in their own interpretation and not that of the Township determined that the SDWA would not allow that lfexibility and filed suit in 1999 rather than exhaust administrative remedies. They claim it would have been futile to pursue administrative remedies even though the evidence shows that the Township officials never sought to enforce their mistaken belief that the SDWA 50 foot radius requirement applied and also indicating a willingness to be flexible.

In this regard, R.4:69-5 provides that "except where it is manifest that the interest of justice requires otherwise, actions in lieu

of prerogative writs shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." The reason for the rule is to allow administrative bodies to perform their statutory functions and resolve factual issues in their area of expertise. The doctrine of exhaustion of remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that they would have to resolve the SDWA fifty foot radius issue before a building permit issued and when advised by the Township Manager that the Township would be flexible. Instead plaintiffs chose to file suit without pursuing an application for subdivision and/or site plan approval or appeal to the County Construction Board of Appeals on the issue of a building permit for a residence on the lot. See 41 Maple Assoc. v. Common Council, 276 NJS 613, 619 (App. Div. 1994) (Emphasis Added)

The requirement for exhaustion may be dispensed with where there is a need for a prompt decision in the public interest or where a question of law is involved or where further resort to administrative recourse would be futile. Pressler, Current NJ Court Rules, comment 6 on R.4:69-5 (2003). In this matter, plaintiffs claim that administrative recourse would have been futile because they determined that if the Township took the position that the SDWA applied (even though this was a mistaken belief) then the Township had no flexibility to relax those standards under plaintiffs' reading of the

SDWA.

However, here the underlying issues clearly required administrative expertise and fact finding. The doctrine of futility as an exception to the exhaustion of remedies does not come into play before applicants as plaintiffs even file a request for relief where there is discretion to grant that request. Preliminary statements from administrative officials, as the Construction Official and Township Manager herein, even if appearing conclusive are just that, preliminary. A landowner must give the land use authority an opportunity to exercise its discretion. See United State Savings Bank v. State of New Jersey,

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DEP, 360 NJS 520, 526 (App. Div. 2003). Generally, until these ordinary processes have been followed, the extent of the restriction on property development by the Township of Sparta is not known and a regulation taking has not yet been established. Palazzolo v. Rhode Island, 533 US 606, 620-621 (2001). The plaintiffs needed to follow reasonable and necessary steps to allow the Sparta Township Planning Board and/or appeal process to exercise discretion in considering development plans for the property. Plaintiffs never took those steps.

Equitable Estoppel

In the alternative, plaintiffs raise an equitable estoppel argument. As previously stated, plaintiffs argue that the Township, through its Engineer in 1999 believed the SDWA fifty foot radius applied to their well and that this knowledge

related back to 1987 when the Township acquired the well. Accordingly, they argue that the Township should have stopped storm water discharges into the fitfy foot radius and should have known that if they believed the SDWA fifty foot radius applied, plaintiffs could not have access to the same to construct a dwelling. They state that the Township should have disclosed this imputed knowledge to plaintiffs to avoid their purchase of the lot and that the Township is equitably estopped from now denying the same. Thus, by virtue of these actions, a taking in inverse condemnation occurred.

Equitable principles of estoppel may be applied against a municipality where the interests of justice, morality and common fairness clearly dictate that course. However, the doctrine is rarely invoked against a governmental entity, particularly when estoppel would interfere with essential governmental functions. It is plaintiffs' burden to prove a claim of equitable estoppel. Bonaventure International v. Spring Lake, 350 NJS 420, 436 (App. Div. 2002). Here plaintiffs' theory of estoppel is grounded in speculation and not supported by the evidence as stated. There simply is no evidence that development of this lot was compromised from the time of purchase to 1999. No municipal official referenced the SDWA and no development application was made by plaintiffs. In 1999 when the SDWA was first referenced by the Township, plaintiffs came to their own conclusions as to its effects on their lot and/or development application. The Township never took the position that the lot could not be developed. Actions by the Township were not the cause of plaintiffs changing their position on development

of the lot.

Taking Without Just Compensation

Finally, to claim a taking either permanent or partial herein plaintiffs would need to show that they have been deprived of virtually all economically viable uses of the property. Pheasant Bridge Corp. v. Township of Warren, 169 NJ 282, 301

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2001). In considering the economic impact, the mere diminution of land value itself does not constitute a taking. Gardner v. NJ Pinelands Comm., 125 NJ 193, 211 (1991). There is no constitutional right to the most profitable use of property and for taking purposes the court views property as a single economic unit. The test is whether the property as a whole has been regulated into inutility. Mt. Olive Complex v. Township of Mt. Olive, 340 NJS 511, 546-547 (App. Div. 2001). Plaintiffs cannot sustain their burden of proof in this regard. There was no obstacles to development shown from 1989 to 1999 and in 1999 when the SDWA issue arose, before exhaustion of remedies, they brought suit. Even if plaintiffs were to claim a temporary taking by Sparta Township for the time period of 1999 when the SDWA issue surfaced and suit was filed until this Court's decision that the SDWA did not apply to their well in 2003, the same would not apply for the reasons stated and also based on the procedural history of this case. The procedural history evidences the reasons for a four year delay to trial which had to do with interlocatory appeals rather than delay caused by Sparta Township.

In this regard, the Court held a pre-trial conference and entered an order on April 26, 2001 which instructed defendants to respond to the plaintiffs' complaint within thirty-five days with discovery to follow and dismissed plaintiffs' suit regarding a zoning change without prejudice. Plaintiffs filed a motion for reconsideration and the Court denied this request on June 16, 2001. Plaintiffs filed leave to appeal to the Appellate Division and also sought a stay pending appeal of the Court's April 26, 2001 Order. These requests were denied on August 7, 2001. Plaintiffs filed an appeal to the New Jersey Supreme Court and also sought a stay pending appeal of the Court's April 26, 2001 Order, and these requests were denied on November 14, 2001. Plaintiffs filed a petition for writ of certiorari with the United States Supreme Court and this request was denied on February 12, 2002.

Plaintiffs then filed a motion with the Court again challenging the April 26, 2001 Order on other grounds, which motion was denied on June 19, 2002. Plaintiffs then filed leave to appeal to the Appellate Division and this request was denied on July 18, 2002. Plaintiffs filed an appeal to the New Jersey Supreme Court which was denied on October 15, 2002. Plaintiffs filed another motion with the Court on October 31, 2002, again seeking to vacate the April 26, 2001 Order, change venue, stay the matter pending a trial in Tax Court or stay pending appeal, and impose a protective order seeking to quash discovery. The Court denied this request on March 10, 2003. Plaintiffs moved to reconsider the Court's March 10, 2003 Order and the Court denied this motion. Plaintiffs then moved to amend their complaint, with other requested

relief and the Court denied this motion on May 23,

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2003. Discovery followed with the Court's determination on motion that the SDWA fitfy foot radius requirement did not apply to plaintiffs' existing well on October 21, 2003.

Summary

In summary, there are no impediments to plaintiffs seeking to develop their lot and no taking by the municipality has occurred. When plaintiffs purchased the property they were aware of the access easement to the well, location and expansion of the sewer treatment plant and at a minimum had constructive knowledge of the drainage issues on the property. Further, they took the property subject to State, County and Municipal laws and regulations governing the use of the premises and to such fact as an accurate survey would disclose. Even if the SDWA fitfy foot radius requirement were to be applicable to their existing well, plaintiffs would have taken the property subject to such regulations. From 1989 to 1999, plaintiffs never sought to develop their lot and were not prevented from doing so.

Thereatfer, in 1999, the Township's actions never caused plaintiffs to change their position on the property to their detriment in reliance on those actions. Rather, it was plaintiffs' own actions in interpreting the SDWA, failing to pursue development and/or exhaust administrative remedies and filing the within complaint that controlled. Accordingly, plaintiffs' complaint is dismissed with prejudice and without costs. The Court has this day entered an

Order in this regard.

Very truly yours,
B. Theodore Bozonelis
Judge of the Superior Court
Assignment Judge

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Filed Nov. 26, 2003
Entered on ACMS

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY)LAW
DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-3901-99
CIVIL ACTION - ORDER

NELSON FERNANDES and
JOAN FERNANDES, Pro Se

Plaintiffs,

vs.

SPARTA TOWNSHIP COUNCIL
SPARTA TOWNSHIP MANAGER
SPARTA TOWNSHIP ENGINEER And
THE NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Defendants.

)

THIS MATTER having been opened to the Court by plaintiffs, Nelson and Joan Fernandes, on a Motion for Reconsideration of the applicability of the Safe Drinking Water Act, and other Court Rulings on October 21, 2003, for Summary Judgment, and other relief, and the plaintiffs requesting that their Motion be considered on the papers submitted, and Laddey, Clark & Ryan, attorney for defendants, Sparta Township Council, Sparta Township Manager and Sparta Township Engineer, having submitted papers in opposition to plaintiffs' Motion and plaintiffs having submitted papers in reply and the Court having considered the papers submitted, and for good cause shown

IT IS ON this 26th day of NOV., 2003 ORDERED:

1. Plaintiffs' Motion for Reconsideration of the application of the Safe Drinking Water Act, and on private and public nuisance, easement and on the ruling on service to defendant stated on the record on October 21, 2003 is denied.

2. Plaintiffs' Motion for Summary Judgment is denied which includes Plaintiffs' Summary Judgment request on failure to exercise due care during inspections, on interference with property rights and on fundamental fairness.

3. Plaintiffs' discovery request for defendants to realign interrogatory answers and admissions, and to propound interrogatories to 23 municipal employees is denied.

4. Plaintiffs' request for a pre-trial conference pursuant to R. 4:25 is denied and in lieu thereof a conference pursuant to R. 4:69-4 is scheduled for December 12, 2003 at 11:30 A.M. on the record with respect to the trial date of January 12, 2004 at 9:00 A.M.

"s/B. Theodore Bozonelis"
Judge of the Superior Court
Assignment Judge

See Statement of Reasons attached hereto.

Statement of Reasons

The Court adopts the reasons set forth on the record on October 21, 2003 as if repeated herein at length. See also D'Atria v. D'Atria, 242 NJ Super 392 (Ch. Div. 1990) as there is no showing of papably incorrect basis or failure to consider or appreciate probative competent evidence by the Court.

The Federal Safe Drinking Water Act 42 USC 300 et seq. and its applicability to New Jersey under NJSA 58:12A-1 et seq. does not require a municipality as Sparta to acquire a 50 foot radius to a well that is not construction of a new or modiifed public community water system. Under the federal law, the extent of a wellhead protection area necessary to provide protection is determined by the State, 42 USC 300 h-7(e). See also, Plaintiffs' Exhibit AAE, the October 23, 2003 letter from the DEP in this regard.

Plaintiffs' arguments for summary judgment are in part predicated on their arguments for application of the Safe Drinking Water Act which the Court found was not applicable as indicated above and further the Court previously determined that issues for trial on estoppel and, as they relate, nuisance and fair dealing present material facts in dispute for trial and encompass arguments on interference with property rights and fundamental fairness. Allegations of negligent inspection involves the Tort Claims Act and the defendants have immunity under NJSA 59:2-6 and 3-7.

Plaintiffs' request for further discovery is not warranted and out of time and defendants' answers to interrogatories and admissions requests have been reviewed by the Court and deemed sufficient.

The Court addressed service of papers under the Rule on the record and determined that options are provided other than hand delivery to the defendants' attorney's office, and that as long as defendants receive the documents, there is no prejudice to plaintiffs. There was no reason to determine the merits of statements of fact by either side on this issue.

As to the request for a pre-trial conference, under Pressler's Comments to R. 4:25-1 as to prerogative writ cases, see Willoughby v. Planning Board, 306 NJ Super 266, 274 (App. Div. 1997) which applies and is now incorporated in R. 4:69-4 effective September 5, 2000 in lieu of the requirements of R. 4:25-1(b).

Filed: Feb. 26, 2004
PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY
DOCKET NO. MRS-L-3901-99
CIVIL ACTION - ORDER

NELSON FERNANDES and
JOAN FERNANDES, Pro Se

Plaintiffs,

vs.

SPARTA TOWNSHIP COUNCIL
SPARTA TOWNSHIP MANAGER
SPARTA TOWNSHIP ENGINEER
And THE N.J. DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Defendants.

THIS MATTER being opened to the Court on the papers on the Motion for Summary Judgment and Reconsideration of plaintiffs, Pro Se, returnable February 20, 2004, and the Court having considered the papers submitted and the opposition papers of the defendants, Laddy, Clark & Ryan, Esqs., attorneys for defendants and the reply brief of plaintiffs and for good cause shown,

IT IS ON THIS 26th day of Feb., 2004 ORDERED that plaintiffs' Motion for Summary Judgment and Reconsideration is DENIED.

"s/B. Theodore Bozonelis"
Judge of the Superior Court Assignment Judge
See Statement of Reasons attached.

Statement of Reasons

The Motion for Reconsideration of the Court's decision on the Safe Drinking Water Act and pre-trial conference is denied as the Court relies on-its previous Orders and Statement of Reasons and did not fail to consider or appreciate the significance of probative competent evidence. D'Atria v. D'Atria, 242 NJS 392 (Ch. Div. 1990).

The statement of facts presented by plaintiffs in support of the Motion for Summary Judgment and as responded to by defendants shows that the same are replete with material facts in issue on claims of a "special relationship" and/or "constructive denial" of a building permit. By way of example, one of the main points of plaintiffs' motion is that Sparta Township constructively denied plaintiffs a building permit in part by the Township Engineer's May 19, 1999 Memo referencing the SDWA and a 50 foot radius of control. Accordingly, plaintiffs argue that the Township is liable in inverse condemnation. In this regard, plaintiffs cite, Kraft v. Malone, 313 NW 2d 758 (Supreme Court of N.D. 1981), overruled on other grounds, Shark v. Thompson, 373 NW2d 859 (Supreme Court of N.D. 1985) and the reasoning of Greenway Dev. Co., Inc. v. Paramus, 163 NJ 546 (2000) at pages 551 and 559 affirming the Law Division. Here, however, whether a constructive denial occurred resulting in inverse condemnation is a material fact in issue. The Township disputes that the same occurred and for example points to the fact that plaintiffs never applied for a building permit and that the Township Engineer's Memo of

May 19, 1999 refers to commenting on a plan prior to a construction permit being issued and the Township Manager's letter to plaintiffs on July 2, 1999 refers to the township position that a 50 foot radius easement would not render the property unbuildable. Further, the Township argues that it has an easement by deed and that plaintiffs were on notice of the same at the time of their purchase.

All of the above are material fact questions for trial.

Filed July 26, 2007

SUPERIOR COURT OF NEW JERSEY
APPE:LLATE DIVISION
DOCKET NO. A- 006309-05T1
MOTION NO. M- 006419-06
BEFORE PART: E
JUDGE(s): WEFING
Yannotti

NELSON FERNANDES,
vs
SPARTA TOWNSHIP COUNCIL,

MOTION FILED: June 25, 2007 By: Nelson Fernandes

SUBMITTED TO COURT: July 23, 2007

ORDER

This matter having been duly presented to the Court, it is: this Day of July, 2007, hereby ordered as follows:

Motion by appellant for reconsideration is denied

For the Court: "s/Dorothea O'C. Wefing" P.J.A.D.

Filed Jan. 18, 2008

SUPREME COURT OF NEW JERSEY
M-542 September Term 2007
61, 586

O R D E R

NELSON and JOAN FERNANDES,
Plaintiffs-Movants,

v.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER and
SPARTA TOWNSHIP ENGINEER,
Defendants.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 15th day of January, 2008.

"s/ CLERK OF THE SUPREME COURT"

04/20/06

Nelson Fernandes – Pro Se
9 Fox Run
Denville, N.J. 07834
(973) 627 – 2138

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MORRIS COUNTY
Docket No. L-1106-06
Civil Action
In Lieu of Prerogative Writs

Nelson & Joan Fernandes,
Plaintiffs,
vs.
Sparta Township Council,
Sparta Township Manager,
Sparta Township Engineer,
Defendants.

Independent Action Needed to File a R. 4:50 (c) & (d) Motion Related to MRS-L-3901-99

FIRST CLAIM - Sparta and its Attorneys Perpetrtated a Fraud Upon the Court to Deny Plaintiffs Their Right to be Heard

1) Plaintiffs filed an inverse condemnation action in order to be compensated for a taking of their lot for public use by Sparta Township. So, they have a property interest in the compensation that would be paid in exchange for the property that was taken.

2) Plaintiffs moved for summary judgment because Sparta took a 50' radius pursuant to SDWA

regulations they believed to be applicable and they allowed the Lake Mohawk Country Club to discharge storm water into that radius from a public road contrary to the SDWA regulations, thus preventing all use.

3) Sparta and its attorneys waived their right to argue exhaustion by filing a cross-motion and admitting they have no SDWA jursidiction. Nor did they argue exhaustion on other grounds. The Court exercised its discretion by entering partial summary judgment in Sparta's favor as an exception to the exhaustion doctrine and scheduled a trial since Sparta did not have SDWA jurisdiction in order to warrant a dismissal of the plaintiffs' complaint for exhaustion.

4) The Court's 10/21/03 order denied plaintiffs' motion and made the following affirmative rulings;

2. **Defendants' cross-motion for summary judgment is granted, limited to and only to the extent that the Court finds that the *New Jersey Safe Drinking Water Act*, including, but not limited to N.J.A.C. 7:10-11.1, does not statutorily apply, retroactively or otherwise, to defendants' well located on plaintiffs' property.**
3. Plaintiffs' other claims of estoppel and as they relate to estoppel, nuisance, temporary taking and fair dealing present material facts in issue for trial.
4. Trial is scheduled for January 12, 2004.

5. Although the parties consent, the Court will not certify paragraphs 1 and 2 of this Order as a final judgment as no affirmative relief is granted thereunder susceptible to enforcement, and material facts continue in issue for trial as stated in paragraph 3

5) Based on the foregoing, Sparta and the Court knew;

a) Exhaustion was waived,
b) Spart succeeded in arguing their lack of SDWA jurisdiction, thereby preventing the dismissal for exhaustion,
c) The Court assumed jurisdiction by entering its 10/21/03 order in Sparta's favor, and by ordering a trial,
d) That order became the law of the case and could only be vacated by providing evidence at trial that would justify reversing it, or by filing an appeal.
e) **Any effort to terminate plaintiffs' rights while this order remains in force would violate; judicial estoppel, the law of the case, the Court order itself, and would be a fraud upon the court that was intended to deny plaintiffs' right to the trial that was ordered.**

6) Sparta and its attorneys also defended two motions for reconsideration of the 10/21/03 order filed by the Plaintiffs, which the Court denied in its 11/26/03 and 2/26/04 orders. So, Sparta and its attorneys further waived their right to have that order reversed by defending it. So, they knew the 10/21/03 order would

never be reversed based on the Court's rulings.

7) Since the 10/21/03 partial summary judgment order was the law of the case and the subsequent orders denied reconsideration of that order, Sparta and its attorneys knew they could never effect a reversal of the 10/21/03 order in order to terminate plaintiffs right to a trial. So, they developed an unconsionable scheme to effect a dismissal of plaintiffs' complaint in order to deprive plaintiffs of their right to be heard.

8) Sparta argued a new exhaustion theory in its May 20. 2004 trial brief without moving to vacate the 10/21/03 order as the law of the case. So, they violated judicial estoppel. Their unconsionable scheme was intended to deny plaintiffs use of established adjudicatory procedures, which is "the equivalent of denying them an opportunity to be heard upon their claimed [rights]."

(The Remainder of this claim was ommitted up to the second claim. The foregoing shows petitioner originally filed an inverse condemnation action and that the current action was filed to have the 7/21/04 judgment vacated for a fraud upon the court and because the 7/21/04 judgment is void))

SECOND CLAIM - The 7/21/04 Judgment is Void for All of the Following Reasons

16) The 10/21/03 order provided inadequate notice since it only addresses trial issues. **There is no notice of the Court's intent to terminate plaintiffs right to trial for exhaustion so plaintiffs could be heard on this issue, since**

plaintiffs rely on the unreversed 10/21/03 order as barring exhaustion arguments.

17) **The Court dismissed plaintiffs' complaint thereby denying them use of adjudicatory procedures based on exhaustion theories that are barred as long as the 10/21/03 order is in force.**

18) During its deliberations, the court reviewed the 10/21/03 order, as follows, and chose not to reverse or amend it. So, the Court knew it continued to have jurisdiction.

> **"The Court, in the course of this litigation by Order of October 21, 2003, determined that the SDWA 50 foot radius requirement applied rather to new or modified well water systems and not existing wells as in the case of plaintiffs' well. Also in the course of this litigation, through motion practice, the State of New Jersey Department of Environmental Protection has confirmed by letter dated October 16, 2003 that the SDWA 50 foot radius requirement would not be applied herein," (Pa6)**

19) **Allowing that order to become conclusive shows the Court knew it retained primary jurisdiction from the time the 10/21/03 order was entered. Therefore, the Court deliberately usurped its power by dismissing the complaint for a want of jurisdiction based on any exhaustion theory. So, the Court's 7/21/04 judgment is void for a denial of due process.**

(The Remainder of this claim was ommitted up to the relief sought)

Relief Sought

26) Reverse and vacate the 7/21/04 judgment in its entirety and reinstate MRS-L-3901-99 to the point prior to trial since the dismissal was based on a usurpation of power and denied plaintiffs due process of law thus rendering that judgment void,

27) A hearing to recovery Legal Fees and all costs and whatever other relief the Court can provide,

28) Recusal of the Judge for usurping his power and denying plaintiffs' their right to be heard in the above-described ways so the R.4:50 motions can be heard by an impartial judge,

29) Disqualify Laddey, Clark and Ryan for perpetrating an unconsionable scheme that effected a dismissal of plaintiffs' complaint in order to deprive them of their right to be heard.

30) Hear a motion to amend the complaint.

31) Schedule a new trial and further allow plaintiffs to file a motion for Summary Judgment.

April 20, 2006 "s/Nelson Fernandes"

June 6, 2006

Nelson Fernandes – Pro Se
9 Fox Run
Denville, N.J. 07834
(973) 627 – 2138

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MORRIS COUNTY
Docket No. L-1106-06
Certification by Nelson Fernandes
In Support of Recusal Motion
& the R.4:50(d) Motion

Nelson & Joan Fernandes,
Plaintiffs,
vs.
Sparta Township Council,
Sparta Township Manager,
Sparta Township Engineer,
Defendants.

I, Nelson Fernandes, do hereby certify the following to be true;

1) I am moving to have Judge Bozonelis (judge) recuse himself because **I believe he is incapable of rendering a fair and impartial decision on my R.4:50 motions because he misrepresented facts and law in order to effect a dismissal, which required me to file this independent R.4:50 action.** His conduct violated Canons 1, 2 A., 3 A.(1) & A.(6) and was prejudicial to the administration of justice thus bringing the judicial office into disrepute. He should recuse himself because he should not be allowed to investigate and adjudicate his own

misconduct.

2) **The judge previously denied my motion for recusal. Then he subsequently denied me due process by allowing Sparta to violate judicial estoppel, by usurping his power, by depriving me of notice and the opportunity to be heard,** and by dismissing my complaint for a want of jurisdiction by knowingly misrepresenting facts and law. **Though Sparta's violation of judicial estoppel preciptated the dismissal of my complaint, it was the judge's bias or gross incompetence that caused him not to estop the judicial estoppel violation and denial of notice.** Given his bad faith conduct, he should recuse himself so a fair and impartial judge can hear the motions.

(The following facts were ommitted up to 10)e)iii))

10) e) iii) The judge then suddenly usurped his power by dismissing my complaint for the following two reasons, thereby depriving me of a decision on the merits,

(1) **He misrepresented facts and law by finding I failed to comply with the SDWA regulation which he knew to be untrue by not reversing the 10/21/03 order, which found the SDWA did not statutorily apply.** This conduct amounts to an act of corruption because the judge misused his office to dismiss my complaint in Sparta's favor by misrepresenting facts and law.

(2) **He dismissed my complaint for failing to exhaust Sparta's newly found exhaustion theory, which amounts to a further usurpation of power and misrepresentation since he waived the exhaustion doctrine in his 10/21/03 order. Consequently, the judge allowed a violation of judicial estoppel that denied me notice, after which he dismissed my complaint, based on an argument that violates judicial estoppel.**

(The remaining facts were ommitted)

CERTIFICATION

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment. (R. 1:4-4(b))

June 6, 2006 "s/Nelson Fernandes"

FILED 11/09/06

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6309-05T1
APPELLATE LETTER BRIEF

NELSON and JOAN FERNANDES,
Plaintiffs-Appellants,
v.
SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER, and
Defendants-Respondents.

(Standards of review presented for the issues that the Appellate Division refused to Decide as they appear in the appellate brief)

1 -The Judge Abused his Discretion by Denying the R. 4:50-1(d) Cross-Motion

Standard of Review

The Appellate Division is required to examine the judgment to determine if it is void ab initio and whether the judge abused his discretion by denying the requested relief, based on;

> "R. 4:50-1 relief from judgment is not to be granted lightly. Ordinarily, denial of such relief will be left undisturbed absent a clear abuse of discretion. . . If a judgment is void and, therefore, unenforceable, it is a particularly worthy candidate for relief (R. 4:50-1(d)) . . We therefore examine first whether, as argued by defendants, the judgment was void ab initio." *Cho Hung*

Bank v. Kim, 361 N.J.Super. 331 (A.D. 2003).

The Third Circuit also requires a plenary review because a deferential standard is not appropriate "because if the underlying judgment is void, it is a per se abuse of discretion . . to deny a movant's motion to vacate the judgment."

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1(d) - The Court Denied the Appellant Adequate Notice

Standard of Review

> "The first prerequisite then of due process is fair notice." *Nicoletta v. No. Jersey Dist. Water Supply Comm.*, 77 N.J. 145 (1978); "At a minimum, due process requires that a party in a judicial hearing receive 'notice defining the issues and an adequate opportunity to prepare and respond.'" . . "**There can be no adequate preparation** where the notice does not reasonably apprise the party of the charges, or **where the issues litigated at the hearing differ substantially from those outlined in the notice.**" *City of East Orange v. Kynor*, 383 N.J.Super. 639 (A.D. 2006)(Emphasis Added)

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1(e) - Sparta Actions were Prejudicial to the Administration of Justice

Standard of Review

The following law applies to violations of court orders;

> "A good motive does not excuse a willful violation of an unreversed court order. In re William Brown Jr., 50 N.J. 435, 437 (1967); In re Contempt of Carton, 48 N.J. 9, 25 (1966)." *Warren County Comm. College v. Warren County Bd. of Chosen Freeholders*, 350 N.J.Super. 489, fn.16 (A.D. 2002), and;

> "**Aside from the preclusive effect of the summary judgment orders, Texaco should have been judicially estopped from raising its newly-found theory . . judicial estoppel precludes a party from assuming a position in a legal proceeding totally inconsistent with the one previously asserted** in the same or another proceeding" *Bahrle v. Exxon Corp.*, 279 N.J. Super. 5 (A.D. 1995). (Emphasis Added)

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2. - The Judge Abused his Discretion by Denying the Recusal Motion

Standard of Review

The standard of review for denying a recusal motion is as follows;

> **(A judge's denial of a recusal motion is reviewed for an abuse of discretion)** State v. Marshall, supra (148 N.J. at 279). *Panitch v. Panitch*, 339 N.J.Super. 63 (A.D. 2001). "Judicial abuse of discretion is tantamount to harmful error, i.e., error clearly capable of producing an unjust result." See Higgins v. Polk, 14 N.J. 490, 493 (1954); see also R. 2:10-2. *Community Hospital Group, Inc. v. More*, 365 N.J.Super. 84 (A.D. 2003). "An abuse of discretion must be such as to shock reason and justice." *Becker v. Welliver*, 34 A.2d 893, 131 N.J.L. 64. 65 (N.J. 1943); **"[i]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source."** Liteky v. U.S., 510 U.S. 540 (1994). *Panitch v. Panitch*, supra.

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"s/Nelson Fernandes"

06/15/06

Laddey, Clark & Ryan, LLP
60 Blue Heron Road
Sparta, New Jersey 07871

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MORRIS COUNTY
Docket No. L-1106-06
Civil Action

Nelson & Joan Fernandes,
Plaintiffs,
vs.
Sparta Township Council,
Sparta Township Manager,
Sparta Township Engineer,
Defendants.

(Sparta made the following admission in its trial brief dated 6/15/06, which was submitted to the trial court and presented to the Appellate Division. This admission shows it admitted to arguing exhaustion contrary to the 10/21/03 summary judgment order that it argued for)

"The Maul case does not support plaintiff's' claim. Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it."

06/15/06 "s/Angelo J. Bolcato"

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(2)

No. 07-1242

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

NELSON and JOAN FERNANDES,
Petitioner(s),

V.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Respondent(s).

On Petition for Writ of Certiorari
To The Appellate Division of New Jersey

SUPPLEMENTAL BRIEF

Mr. and Mrs. Nelson Fernandes
9 Fox Run
Denville, New Jersey 07834
(973) 627-2138

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Supplemental Brief

Waiving its right to file a brief in opposition represents an intervening matter that permits this supplemental brief. ***R***.15.8. It further means Sparta is not disputing the facts and law presented especially Mr. Bolcato's exhaustion admission. Given his lack of candor and truthfulness below, [1] Mr. Bolcata chose to waive his right in this Court. In expectation of a brief in opposition, petitioner reviewed his petition and found that he overlooked the following matters.

Mr. Bolcato made a false statement of law (***RPC*** 3.3(a)(1)) by arguing ***Schiffner*** to bar petitioner's claims,[2] since it holdings apply to the one year time limits in ***R***.4:50,[3] not the fraud upon the court [4] and void judgment issues in this case.[5]

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[1] "Attorney Grievance Comm'n of Maryland v. Middleton, 756 A.2d 565, 573-74 (Md. App. 2000) (upholding state bar's indefinite suspension of a lawyer because of intentional misrepresentations to a court since "candor and truthfulness are two of the most important moral character traits of a lawyer")." ***Baltimore Scrap Corp. v. David J. Joseph Co.***, 237 F.3d 394 (4th Cir. 2001)

[2] "Resort to R.4:50 may not be used as a substitute for appeal as plaintiff attempts herein, see, In re Estate of Schifftner, 385 N.J. Super 37, 43 (App. Div. 2006). " (P3) (6/23/06 order)

[3] "If relief, however, is sought based upon R. 4:50-1(d), (e) or (f) or R. 4:50-1 (fraud upon the court) the complaint shall be filed within a reasonable time under the circumstances. . . . ("It is well established that an R. 4:50 motion may not be used as a substitute for a timely appeal") . . ("The rule may not be used to convert a 'trial error' from which an appeal must be taken within 45 days into a 'mistake' which may be corrected within one year.")" ***In re Estate of Schifftner***, 385 N.J.Super. 37, 41-43 (App.Div. 2006)

[4] "The savings clause to Rule 60(b) further provides "[t]his rule does not limit the power of a court to entertain an independent

Petitioner's independent action to file a ***R***.4:50-1(c) fraud upon the court motion (P46) is modeled after ***Rule*** 60 (b)(3),[6] which allows those prevented from

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action to . . . set aside a judgment for fraud upon the court." This Court reviews a district court's denial of a Rule 60(b) motion for abuse of discretion. . . . **"Parties seeking relief under Rule 60(b) have a higher hurdle to overcome because such a motion is not a substitute for an appeal." "Accordingly, our review is meaningfully narrower than review of the merits of a direct appeal.". "Given the lower court's discretion, the district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." A reviewing court may reverse only if it finds "a complete absence of a reasonable basis and [is] certain that the . . . decision is wrong." However, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." . . . . . Fraud between the parties and fraud on the court are two distinct bases for post-judgment relief. "Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties . . . ."** Buck, 281 F.3d at 1342. **Fraud on the court claims merit separate analysis not only because they are exempt from the one year time-period for filing claims under Rule 60(b)(3)."** ***Zurich North America v. Matrix Service, Inc.***, 426 F.3d 1281 (10th Cir. 2005).

[5] **"A judgment is void [and thus may be set aside under Rule 60(b)(4)] "only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." In re Four Seasons Sec. Laws Litig., 502 F.2d 834, 842 (10th Cir.1974).** Despite the language of Rule 60(b) that all motions for relief must be "made within a reasonable time," a motion under Rule 60(b)(4) may be made at any time." ***In re TEC Resources, LLC***, No. NO-02-056 (10th Cir. 2003).

[6] "R. 4:50-1(c). This rule is modeled after Federal Rule 60(b)(3)." ***Palko v. Palko***, 73 N.J. 395, 400-401 (NJ 1977).

exhibiting fully their case to set aside and annul the former judgment,[7] making it "a continuation of the former suit".[8] Mr. Bolcato's judicial estoppel violation and fraud upon the court requires vacating the 6/23/06 order, 6/14/07 affirmation, and 7/21/04 judgment because they are sufficiently gross so as to require a departure from res judicata [9] achieved by a judicial estoppel violation.[10] His 5/25/06 certification in support of res judicata implicitly certifies the

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[7] "[W]here the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception . . . a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."). "If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." ***Computer Leasco, Inc. v. NTP, Inc.***, 194 Fed.Appx. 328, 2006 Fed.App. 0670N (6th Cir. 2006)

[8] "Because the action, if successful, would have the effect of vitiating the federal judgments, the action would have been treated as "ancillary" to the earlier federal proceedings in essence, as "a continuation of the former suit" in federal court even if it was formally denominated as an "independent action" for fraud. U.S.v. Beggerly, 524 U.S. 38, 45-46 (1998) (quoting Pacific R.R. of Mo. v. Missouri Pacific Ry. Co., 111 U.S. 505, 522 (1884)). " ***Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,*** No. 07-0065-cv, fn.13 (2d Cir. 2007).

[9] "Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "inJustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 244 (1944). " ***U.S. v. Beggerly,*** 118 S.Ct. 1862 (U.S. 1998).

[10] ***State of N.H. v. State of Maine***, 532 U.S. 742 (U.S. 2001) (fn. 69 in petition).

7/21/04 judgment is valid, final and on the merits.[11] Petitioner's claims are the result of Sparta's judicial estoppel violation, the judge's misrepresentation of the SDWA issue, and advisory opinions rendered after his dismissal for exhaustion. *Id.* Twenty days later, Mr. Bolcato filed his 6/15/06 trial brief (P59) admitting he argued exhaustion in the former case,[12] which resulted in a dismissal for exhaustion (P28)[13] thereby depriving the court of jurisdiction.[14] So, the judge assumed hypothetical juridsdiction to address

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[11] "The term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Three elements must be met for res judicata to apply: "[1] the judgment relied upon must be valid, final and on the merits; [2] the parties in the two actions must be either identical or in privity with one another; [3] the claims [in the subsequent case] must grow out of the same transaction or occurrence." "For the purposes of res judicata, causes of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence." A litigant must present all theories in the first action when seeking to remedy a single wrong. Ibid. ***Hawkins v. Garden State Surgical Assoc., P.A.***, No. A-3952-06T3 (App.Div. 2008) (internal citations ommitted) (emphasis added)

[12] "The Maul case does not support plaintiff's' claim. Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." (P59).

[13] "The doctrine of exhaustion of remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that they would have to resolve the SDWA fifty foot radius issue before a building permit issued (P28)."

[14] "If a court then determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits. It has no authority to do so." **In re Orthopedic "Bone Screw" Products Liability Litigation**, 132 F.3d 152 (3d Cir. 1997).

the merits, which he is not allowed to do,[15] thereby violating the unreversed law of the case [16] to retroactively nullify the trial.[17] So, Mr. Bolcato misrepresented the 7/21/04 judgment as final and on the merits to achieve the 6/23/06 res judicata ruling (P1-4), knowing he argued exhaustion in violation of the 10/21/03 summary judgment order. Therefore, his admission constitutes a false statement of law with respect to ***Maul***.

The 6/15/06 trial brief (P59) provides the degree of formality needed to be binding on trial and appellate courts.[18] In it, Mr. Bolcato admits to arguing exhaustion to meet petitioner's ***Maul*** argument, which requires notice when the law of the case is affected, thus making his admission

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[15] "The Supreme Court has held that courts may not assume "hypothetical jurisdiction" to resolve a case on the merits. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101--02 (1998). In other words, an actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of a case. " ***Malaysia International Shipping Corp. v. Sinochem Inter. Co. Ltd.***, 436 F.3d 349 (3d Cir. 2006).

[16] ***Williams v. Runyon***, 130 F.3d 568 (3d Cir. 1997). (fn.33 in petition)

[17] ***Bouie et al. v. City Columbia***, 84 S. Ct. 1697, 378 U.S. 347 (U.S. 1964) (fn. 24 in petition)

[18] "In order to constitute a judicial admission that is binding on both the trial and appellate courts, an attorney's statement must have a fair degree of "formality"; i.e., it must be done in writing or in open court and amount to a real concession of a fact at issue, and not have been made merely as a concession for some unrelated purpose. American Title Ins. Co. v. Lacelaw Corp.,861 F.2d 224, 226, 227 (9th Cir. 1988). " ***United States v. Novak***, 99 F.3d 1147 (9th Cir. 1996) (emphasis added)

conclusive.[19] So, petitioner was not required to provide further proof, whereas, the trial court was required to accept his admission "as if established by the clearest proof".[20] Hence, failure to address an admitted judicial estoppel violation to avoid restoring the right to a trial requires this Court to correct it.[21]

Mr. Bolcato twice violated judicial estoppel to perpetrate frauds upon the court.[22] First, by arguing exhaustion to effect a lack of jurisdiction dismissal contrary to the unreversed 10/21/03 order. Then,

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[19] "A judicial admission, deliberately drafted by counsel for the express purpose of limiting and defining the facts in issue, is traditionally regarded as conclusive, and an admission under Rule 36 falls into this category."*fn9 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2264, at 742-43." ***Airco Industrial Gases Inc. v. Teamsters Health and Welfare Pension Fund of Philadelphia and Vicinity***, 850 F.2d 1028 (3rd Cir. 1988)

[20] "When a party has admitted to a fact, the opposing party may "dispense with proof of facts for which witnesses would otherwise be called" as to that issue, and "any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880)." ***Philadelphia Reinsurance Corp. v. Employers Insurance of Wausau,*** 61 Fed.Appx. 816 (3d Cir. 2003)

[21] (This Court should correct questions of law erroneously decided that result in confiscation) ***Clark's Ferry Bridge Co. v. P.S. Comm. Pa.,*** 54 S. Ct. 427, 291 U.S. 227 (U.S. 1934)

[22] "Fraud upon the court" is narrowly construed. It has been found only in those instances where the fraud vitiates the court's ability to reach an impartial disposition of the case before it. "Fraud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision," preventing the opposing party "from fully and fairly presenting his case." ***Davenport Recycling Assoc. v.a Comm. of I.R.S.***, 220 F.3d 1255 (11th Cir. 2000), (internal citations ommitted)

claiming the lack of jurisdiction was a dismissal on the merits in this case. Hence, he used the advisory opinion rendered after the judge assumed hypothetical jurisdiction to support his position. So, the judge's advisory opinion represents action taken in bad faith, contrary to the law of the case in conscious excess of jurisdiction, or for a corrupt or improper motive since the judge knew Sparta admitted exhaustion.[23] So, res judicata and the subsequent affirmation were the result of Mr. Bolcato's second fraud on the court.

Plain Error Standard of Review

The Fourth Circuit applies ***Olano*** to civil cases for plain errors which effect substantial rights when it can conclude, "after examining the particulars of the case, that the error seriously

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[23] **"Essentially two types of judicial acts fall within the scope of bad faith: (1) "intentionally committed acts which [the Judge] knew or should have known were beyond [the Judge's] lawful power" and that involve "actual malice as the motivation for a Judge's acting ultra vires"; and (2) intentionally committed "acts within the lawful power of a Judge which nevertheless are committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties." (willful misconduct in office "implies or requires actions taken in bad faith, contrary to law or in conscious excess of jurisdiction, or for a corrupt or improper motive.").** "The lesser included charge of conduct prejudicial [to the administration of Justice] connotes 'conduct which a Judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office' as well as wilful misconduct out of office, ..." Gonzalez v. Commission on Judicial Performance, 657 P.2d 372, 373-74, 188 Cal. Rptr. 880 (Cal. 1983), quoting Geiler, 515 P.2d at 9, n.11." ***In re Jett,*** 882 P.2d 414, 180 Ariz. 103 (Ariz. 1994)

affects the fairness, integrity or public reputation of judicial proceedings." [24] An error is clear or obvious when the settled law of the Supreme Court or a Circuit Court establishes that an error has occurred. *Id.* This Court finds an important question of procedural due process is raised under the Fourteenth Amendment when there is a denial of a fair hearing under state law.[25] It will also address a claim of judicial misconduct when the judge's behavior was so prejudicial that it denied a fair, as opposed to a perfect, trial." [26]

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[24] **"This court has held that the approach set out by the Supreme Court in Olano should also be applied in civil cases.** ("Before we can exercise our discretion to correct an error not raised below in a civil case, at a minimum, the requirements of [Olano] must be satisfied."), **Under the Olano standard, there must be an error, that error must be plain, and the error must affect the appellant's substantial rights. See Olano, 507 U.S. at 732. . . ("If the forfeited error is plain and affects substantial rights, the court of appeals has authority to order correction, but is not required to do so.") . . . We should exercise our discretion to correct the error only if we can conclude, "after examining the particulars of the case, that the error seriously affects the fairness, integrity or public reputation of judicial proceedings." ("To be plain, an error must be clear or obvious . . . An error is clear or obvious when the settled law of the Supreme Court or this circuit establishes that an error has occurred. In the absence of such authority, decisions by other circuit courts of appeals are pertinent to the question of whether an error is plain.")"** ***Brickwood Contr., Inc. v. Datanet Eng., Inc.***, 369 F.3d 385 (4th Cir. 2004)

[25] "If meanwhile she was denied a fair hearing under state law, an important question of procedural due process is raised under the Fourteenth Amendment." ***Tarver v. Smith***, 402 U.S. 1000, 1003 (U.S. 1971) (fn. 84 in petition)

[26] In reviewing a claim of judicial misconduct, "we must determine whether the judge's behavior was so prejudicial that

Petitioner's opening brief quotes; State, Circuit, and Supreme Court rulings proving numerous plain errors in both cases.[27] Moreover, petitioner proved Mr. Bolcato violated judicial estoppel to perpetrate a fraud upon the court and pleaded judicial estoppel in his 4/20/06 complaint (P46),[28] which prompted Mr. Bolcato to again violate judicial estoppel to prevent petitioner from being heard in this case, as well.

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it denied [defendants] a fair, as opposed to a perfect, trial ***U.S. v. Gurary***, 860 F.2d 521 (2nd Cir. 1988).

[27] In the state court, petitioner apparently attacked the trial judge's ruling as an abuse of discretion, not as a deprivation of his constitutional rights. While it is true that, as a general matter, this Court will not review federal constitutional issues that have not been raised in state court, this rule is not absolute. When the record in a case has revealed plain error, this Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly his federal constitutional claim in the court below. ***Williams v. Florida***, 104 S. Ct. 1617, 465 U.S. 1109, 1112 (U.S. 1984)

[28] Recent decisions do indicate that an appellate court can raise the doctrine of judicial estoppel on its own motion if confronted with an especially egregious case wherein a party has successfully asserted a directly contrary position. Absent a flagrant threat to the judicial process, however, we will not disregard the waiver produced by a failure to plead judicial estoppel in conformity with Federal Rule of Civil Procedure 8(c). ***U.S. v. C.I.T. Constr. Inc. of Texas***, 944 F.2d 253 (5th Cir. 1991) (internal citations ommitted)

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(3)

No. 07-1242

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In The

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NELSON and JOAN FERNANDES,
Petitioner(s),

V.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Respondent(s).

On Petition for Writ of Certiorari
To The Appellate Division of New Jersey

PETITION FOR REHEARING

Mr. and Mrs. Nelson Fernandes
9 Fox Run
Denville, New Jersey 07834
(973) 627-2138

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This Petition for Rehearing Should be Granted

This petition to rehear the denial of the petition for a writ of certiorari should be granted because "other substantial grounds not previously presented", ***Rule*** 44.2, will show the N.J. Appellate Division abused its discretion by affirming res judicata instead of sua sponte raising judicial estoppel.[1] Petitioner previously argued the Appellate Division refused to decide judicial estoppel after he raised that issue,[2] which overlooked its abuse of discretion by not sua sponte raising judicial estoppel. So, affirming res judicata was arbitrary, capricious or whimsical, and resulted in a manifestly

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[1] We review a judicial estoppel decision for abuse of discretion.*fn2 Eastman v. Union Pac. R.R. Co., 493F.3d 1151, 1156 (10th Cir. 2007). "A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." Id. ***Bradford v. Wiggins***, No. 06-4287 (10th Cir. 2008)

[2] "Even had defendants not raised the argument on appeal, we could sua sponte consider whether judicial estoppel is appropriate under the facts presented. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), cert. denied, 115 L. Ed. 2d 1078, 111 S. Ct. 2915 (1991) ("Because it is intended to protect the integrity of the judicial process, [judicial estoppel] is an equitable doctrine invoked by a court at its discretion.")" ***Demarco v. Ohio Decorative Prod.***, 19 F.3d 1432, fn.5 (6th Cir. 1994).

unreasonable judgment. So, petitioner did not meet the jurisdictional requirement of 28 U.S.C. §1257, which allows this Court to review a decision of the highest court in a state in which a decision could be had, which explains the denial of the Petition for Certiorari.

Sparta's Unconscionable Scheme

The following will show Sparta's attorney [3] deliberately planned and executed an unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter, which requires this Court to act when it finds a scheme to defraud the courts.[4] So, "freedom from estoppel" is "outweighed by the countervailing

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[3] "The cases have struggled, usually without great success, to provide a useful definition of "fraud on the court." One common version, drawn in part from language in Hazel-Atlas, refers to "an 'unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter' involving an officer of the court." Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 n.5 (1st Cir. 1995) (quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989))." ***Roger Edwards, LLC v. Fiddes & Son Ltd.***, 427 F.3d 129 (1st Cir. 2005).

[4] ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944). (This Court will act when it finds a deliberately and carefully executed scheme to defraud the courts).

interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government" since Sparta's fraud upon the court [5] involves an unconscionable plan or scheme that hampered petitioner's presentation of his claims on two separate occassions.[6] The attorney's scheme meets the three factors that "typically inform the decision whether to apply the doctrine (judicial estoppel) in a particular case." [7] Moreover, enforcing

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[5] ***Heckler v. Community Health Services Crawford County***, 467 U.S. 51, 60-61 (U.S. 1984) (freedom from estoppel can be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.)

[6] Cooper cannot obtain postjudgment relief based on allegations of "fraud on the court," unless he has "demonstrated, clearly and convincingly, that [the government] has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp.,892 F.2d 1115, 1118 (1st Cir. 1989). ***United States v. Parcel of Land and Residence at 18 Oakwood Street,*** 958 F.2d 1 (1st Cir. 1992)

[7] "Courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," Allen, 667 F. 2d, at 1166; accord Lowery v. Stovall, 92 F. 3d 219, 223 (CA4 1996); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F. 2d 208, 212 (CA1 1987). Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: **First, a party's later position must be "clearly inconsistent" with its earlier position.** United

the 7/21/04 judgment is manifestly unconscionable,[8] thus requiring that judgment and the 6/23/06 summary judgment order to be vacated.[9] The

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States v. Hook, 195 F. 3d 299, 306 (CA7 1999); In re Coastal Plains, Inc., 179 F. 3d 197, 206 (CA5 1999); Hossaini v. Western Mo. Medical Center, 140 F. 3d 1140, 1143 (CA8 1998); Maharaj v. Bankamerica Corp., 128 F. 3d 94, 98 (CA2 1997). **Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled,"** Edwards, 690 F. 2d, at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," United States v. C. I. T. Constr. Inc., 944 F. 2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See Hook, 195 F. 3d, at 306; Maharaj, 128 F. 3d, at 98; Konstantinidis, 626 F. 2d, at 939. **A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.** See Davis, 156 U. S., at 689; Philadelphia, W., & B. R. Co. v. Howard, 13 How. 307, 335-337 (1852); Scarano, 203 F. 2d, at 513 (judicial estoppel forbids use of "intentional self-contradiction ... as a means of obtaining unfair advantage"); see also 18 Wright §4477, p. 782." ***State of New Hampshire v. State of Maine***, 532 U.S. 742 (U.S. 2001). (emphasis added)

[8] Webster's defines "unconscionable" as "excessive;" "exorbitant;" "lying outside the limits of what is reasonable or acceptable;" "shockingly unfair, harsh, or unjust;" or "outrageous." Webster's Third New International Dictionary 2486 (1993).

[9] "Where enforcement of the judgment is "manifestly unconscionable," Pickford v. Talbott, 225 U.S. 651, 657, they have wielded the power without hesitation. ***HAZEL-ATLAS GLASS CO. v. HARTFORD-EMPIRE CO.***, 64 S. Ct. 997, 322 U.S. 238, 244-245 (U.S. 05/15/1944)

judicial estoppel violation resulted in the judge's dismissal for a lack of juridisdiction thereby denying petitioner's their right to be heard contrary to the unreversed 10/21/03 order, thus making the 7/21/04 judgment "manifestly unconscionable."

Sparta's attorney deliberately executed an unconscionable scheme by arguing exhaustion based on new theories that violate judicial estoppel which resulted in a dismissal for a lack of jurisdiction in the 7/21/04 judgment. That position runs contrary to his previously successful argument, which resulted in the court assuming jurisdiction and ordering a trial in its 10/21/03 summary judgment order. So, this judicial estoppel violation derived an unfair advantage because it caused the judge to end the trial thereby negating petitioner's testimony and his right to be heard after expressly stating the 10/21/03 order was correct, thus making his dismissal unconscionable.

Petitioner's independent action (P46-51) sought to have the 7/21/04 judgment set aside for fraud upon the court. Here again, Sparta's attorney violated judicial estoppel by taking a position contrary to his former successful exhaustion

argument by arguing the 7/21/04 dismissal for a lack of jurisdiction (P28-29) was a decision on the merits, in order to effect a res judicata dismissal. He did so, after admitting to arguing exhaustion in the former case, thus admitting his contrary successful position (P59). The trial court's 6/23/06 summary judgment order denied a recusal motion and found res judicata in Sparta's favor. Therefore, this second judicial estoppel violation derived an unfair advantage by resulting in res judicata though the former dismissal was for a lack of jurisdiction (P28-29). This shows the dismissal for exhaustion merely sought to end the trial so Sparta could subsequently violate judicial estoppel by arguing res judicata bar. Consequently, these judicial estoppel violations represent a fraud upon the court because they prevented petitioners from fully and fairly presenting both cases.

A review of the 7/21/04 judgment will show the trial judge never reconsidered his 10/21/03 order. So, the trial judge's lack of respect for the unreversed 10/21/03 order further makes his 7/21/04 judgment manifestly unconscionable. ***HAZEL-ATLAS GLASS CO. v. HARTFORD-EMPIRE CO.,*** 64 S. Ct. 997, 322 U.S. 238, 244-245 (U.S. 05/15/1944)

The first part of Sparta's scheme ended the trial for a lack of jurisdiction. Doing so deprived petitioner of his property "without its ever having had an opportunity to defend against the exaction" by retracting petitioner's right to be heard by means of a dismissal achieved by a fraud upon the court.[10] By following this dismissal with an advisory opinion and a dismissal with prejudice based on his advisory opinion, the judge set the stage for Sparta's subsequent res judicata argument and his res judicata ruling in order to prevent petitioner from being heard on his ***R***.4:50 motion in order to prevent the 7/21/04 judgment from being vacated.

Sparta's attorney's scheme "tampering with the administration of justice in the manner indisputably shown here involves far more than an

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[10] "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." ***Brinkerhoff-Faris Tr. & Sav. Co. v. Hill***, 281 U.S. 673 (U.S. 1930).

injury to a single litigant. It is a wrong against the institutions (courts) set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944).

Abuse of Discretion by not Sua Sponte Raising Judicial Estoppel

The holdings of ***Bahrle*** [11] as affirmed by the N.J. Supreme Court shows the Appellate Division sua sponte raised judicial estoppel to protect the integrity of the judicial process and admonished the

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[11] "Aside from the preclusive effect of the summary judgment orders, **Texaco should have been judicially estopped from raising its newly-found theory** against Exxon/Ritchie. See Levin v. Robinson, Wayne & LaSala,246 N.J. Super. 167, 179-80, 586 A.2d 1348 (Law Div. 1990) (judicial estoppel precludes a party from assuming a position in a legal proceeding totally inconsistent with the one previously asserted in the same or another proceeding). Judicial estoppel is a principle of equity, but unlike equitable estoppel it "looks to the connection between the litigant and the judicial system" rather than the relationship between the parties. Oneida Motor Freight, Inc. v. United Jersey Bank,848 F.2d 414, 419 (3rd Cir.), cert. denied, 488 U.S. 967, 109 S. Ct. 495, 102 L. Ed. 2d 532 (1988). Its fundamental premise is to protect the integrity of the judicial system by preventing litigants from "'playing fast and loose'" with the court "to suit the exigencies of self interest." ***Bahrle v. Exxon Corp.***, 279 N.J. Super. 5, aff. 145 N.J. 144 (N.J. 1996). (emphasis added)

trial judge for allowing new theories. A year later, the Appellate Division found judicial estoppel also applies to the state in a taking's case for failing to act forthrightly.[12] So, judicial estoppel in New Jersey, was taking action with respect that part of ***Hazel-Atlas*** that held "the public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hence, the Appellate Division's failure to sua sponte raise judicial estoppel to protect the integrity of the judicial process in the face of two blatant violations was an abuse of discretion.

Petitioner's independent action sought to have the 7/21/04 judgment set aside because it openly states a position contrary to the unreversed 10/21/03 summary judgment order. Hence, it is a continuation of the former proceeding.[13] Therefore, the trial judge

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[12] "Judicial estoppel prevents the State from taking a different position at trial concerning the value of the property from that which it had assumed when it made its offers and deposited with the court clerk what it considered to be the property's fair market value." ***State, D.E.P. v. Fairweather***, 298 N.J.Super. 421 (A.D. 1997)

[13] ***CAREY v. HOUSTON AND TEXAS CENTRAL RAILWAY CO.***, 161 U.S. 115, 128 (U.S. 1896) (this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law).

and the Appellate Division's failure to consider these orders on their face were an abuse of discretion.

The holdings of ***Bahrle*** further shows the Appellate Division relied on a 3 rd. Circuit judicial estoppel ruling. Hence, the Appellate Division's refusal to sua sponte raise judicial estoppel after petitioner brought it to their attention was an abuse of discretion that supports the inference that it tacitly approved judicial estoppel to terminate petitioner's right to be heard and to end their inverse condemnation action. The Appellate Division also failed to review the denial of the recusal motion for an abuse of discretion, which supports the inference that it avoided this issue because the judge's conduct proves a deliberate abuse of discretion with respect to his duty to sua sponte raise judicial estoppel. So, the New Jersey courts have decided an important federal question in a way that conflicts with two relevant New Jersey decisions and two relevant decisions of this Court by failing to sua sponte raise judicial estoppel to protect the integrity of the judicial process. ***State of N.H. v. State of Maine***, 532 U.S. 742 (U.S. 2001) (judicial estoppel, "generally prevents a party from prevailing in one

phase of a case on an argument and then relying on a contradictory argument to prevail in another phase . . . other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process"). Especially when a fraud upon the court is involved.[14]

Petitioner also raised question 6 to have this Court decide "an important question of federal law that has not been, but should be, settled by this Court" since at least four circuits can sua sponte raise judicial estoppel.[15] Why should petitioner have to prove New Jersey's courts abused its discretion by not sua sponte raising judicial estoppel to protect the integrity of the judicial process since finding a judicial estoppel violation would prove they abused their discretion.

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[14] ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944).

[15] "This court may raise judicial estoppel sua sponte in "especially egregious case[s] wherein a party has successfully asserted a directly contrary position." ***Beall v. U.S.***, 467 F.3d 864 (5th Cir. 2006); ***Grigson v. Creative Artists Agency***, 210 F.3d 524 (5th Cir. 2000); ***U.S. Philips Corp. v. Sears Roebuck & Co.***, 55 F.3d 592 (Fed. Cir. 1995); ***In re Cassidy***, 892 F.2d 637 (7th Cir. 1990);] ***Cathcart v. Flagstar Corp.***, 155 F.3d 558 (4th Cir. 1998); ***West Virginia Dep't of Transportation, Div. of Highways, A State Agency v. Robertson***, 618 S.E.2d 506, 217 W.Va. 497 (W.Va. 2005).

Sparta's Judicial Estoppel Violations and Fraud Appears on the Face of the Orders

On its face, the unreversed 10/21/03 summary judgment order shows the court assumed jurisdiction and ordered a trial [16] because Sparta successfully argued the court had jurisdiction since the SDWA did not statutorily apply to petitioner's lot. [17] The 10/21/03 summary judgment order became the law of the case, ***Lanzet v. Greenberg***, 126 N.J. 168 (1991) (Summary judgment orders are the "law-of-the-case"); ***Castellano v. Fragozo***, 311 F.3d 689 (5th Cir. 11/20/2002) (law of the case established by summary judgment).

On its face, the 7/21/04 judgment shows the judge dismissed petitioner's complaint for a lack of jurisdiction proving Sparta contradicted its former successful position by arguing petitioner failed to exhaust SDWA administrative remedies and other

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[16] "4. Trial is scheduled for January 12, 2004. " (P13)

[17] "2. Defendants' cross-motion for summary judgment is granted, limited to and only to the extent that the Court finds that the ***New Jersey Safe drinking Water Act***, including, but not limited to N.J.A.C. 7:10-11.1, does not statutorily apply, retroactively or otherwise, to defendants' well located on plaintiffs' property." (P13)

new found theories. Hence, the trial judge abused his discretion by not sua sponte raising judicial estoppel pursuant to ***Bahrle,*** since new theories are barred by judicial estoppel.[18] Therefore, the dismissal for a lack of jurisdiction[19] represents a ruling contrary to the law of the unreversed 10/21/03 summary judgment order which implicitly found the court had

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[18] **(Texaco should have been judicially estopped from raising its newly-found theory)** ***Bahrle v. Exxon Corp.***, 279 N.J. Super. 5, aff. 145 N.J. 144 (N.J. 1996). (emphasis added)

[19] "In this regard, R.4:69-5 provides that "except where it is manifest that the interest of justice requires otherwise, actions in lieu of prerogative writs shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." The reason for the rule is to allow administrative bodies to perform their statutory functions and resolve factual issues in their area of expertise. **The doctrine of exhaustion of remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that they would have to resolve the SDWA fifty foot radius issue before a building permit issued and when advised by the Township Manager that the Township would be flexible.** Instead plaintiffs chose to file suit without pursuing an application for subdivision and/or site plan approval or appeal to the County Construction Board of Appeals on the issue of a building permit for a residence on the lot. See 41 Maple Assoc. v. Common Council, 276 NJS 613, 619 (App. Div. 1994) (Emphasis Added) " (P28-29) (emphasis added)

jurisdiction thereby prejudicing petitioner's right to the trial that remains ordered. Moreover, a dismissal for a lack of jurisdiction is not a dismissal on the merits.[20] Hence, the judge did not respect the law of the case, as required.[21] So, ending the trial and dismissing for exhaustion in the face of the unreversed 10/21/03 summary judgment order usurps the law of the case.[22] Since, ***Bahrle*** relies on a 3 rd. Circuit ruling the following law is helpful. Sparta's attorney admits to arguing exhaustion in a trial brief. [23] This admission shows Sparta's judicial

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[20] "[U]nless the order otherwise specifies, a[n] [involuntary] dismissal . . . other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits." ***Velasquez v. Franz***, 123 N.J. 498, 508 (N.J. 1991); ***Alan J. Cornblatt, P.A. v. Barow***, 153 N.J. 218, (N.J. 1998) (same).

[21] ***Sisler v. Gannett Co., Inc.***, 222 N.J. Super. 153, 159 (A.D. 1987), cert. den. 110 N.J. 304 (1988) ("judges are required to respect unreversed decisions made during the trial . . unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous.")

[22] As Professor Moore has pointed out, policy considerations strongly dictate that the concept of void judgments be restricted and that unappealed civil judgments not be dealt with as void except where there has been a plain usurpation of power. ***State v. American Can Co.***, 42 N.J. 32 (N.J. 1964).

[23] "Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." (P59)

estoppel violation caused the judge to violate the two prudential considerations in the law of ***Raquwl*** by not requiring a separate hearing. [24] As to the first, the judge did not reconsider the 10/21/03 summary judgment order. To the contrary, his 7/21/04 judgment expressly states the SDWA does not apply. [25] The judge also refers to an NJDEP letter to show it would not apply the SDWA to petitioner's lot.[26] Hence, the 10/21/03 order still applies. As to the second consideration, by dismissing the complaint after the trial instead of calling for a hearing before the trial, the judge took no appropriate steps so

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[24] Although a trial Judge has the power to reconsider an earlier decision, its authority to do so is limited by two prudential considerations: "First, the court must explain on the record the reasoning behind its decision to reconsider the prior ruling. Second, the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." Williams, 130 F.3d at 573. ***Raquwl v. Education Management Corp.***, 196 F.3d 171 (3d Cir. 11/09/1999)

[25] "The Court, in the course of this litigation by Order of October 21, 2003, determined that the SDWA 50 foot radius requirement applied rather to new or modified well water systems and not existing wells as in the case of plaintiffs' well." (P23)

[26] "Also in the course of this litigation, through motion practice, the State of New Jersey Dept. of Environmental Protection has confirmed by letter dated October 16, 2003 that the SDWA 50 foot radius requirement would not be applied." (P23)

petitioners were not prejudiced by their reliance on the 10/21/03 order. Failing on these two points shows the judge did not reconsider his 10/21/03 order. Hence, the judge's dismissal in the face of the unreversed 10/21/03 order shows the judge knew he was denying petitioners due process, which renders the 7/21/04 judgment void. ***Construction Drilling, Inc. v. Chusi.*** So, the 7/21/04 judgment and the 6/23/06 summary judgment order are unconscionable since the 10/21/03 order continues to represent the law of the case based on the judge's own findings. More importantly, the foregoing conduct by the judge is the direct result of Sparta's attorney's fraud upon the court. Had the judge sua sponte raised judicial estoppel he would have protected the integrity of the judicial process and prevented the fraud on the court.

The 7/21/04 judgment shows the judge states the 10/21/03 order still applies, then dismisses the complaint for a lack of jurisdiction, which proves a bias in Sparta' s favor. So, the judge was "without jurisdiction to entertain the suit and grant the relief sought therein." ***Pleasantville Taxpayers v. City of Pleasantville,*** 111 N.J.Super. 377,381-382 aff. 115 N.J.Super. 85 (A.D. 1971) ("Where the failure to

exhaust administrative remedies exists, as here, the court is without jurisdiction to entertain the suit and grant the relief sought therein"); ***Asemani v. Attorney Gen. of the U.S.***, No. 03-4059, fn.5 (3d Cir. 2005) (Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .").). Therefore, the opinion rendered on the merits and the dismissal with prejudice [27] after relinquishing jurisdiction is advisory and cannot be accepted by this Court or the N.J. Supreme Court.[28]

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[27] "Plaintiff's Complaint is dismissed with prejudice and without costs." (P34)

[28] An advisory opinion is a non-binding statement by a court or an administrator interpreting the law on a matter submitted for that purpose. See Black's Law Dictionary 1119 (7th ed. 1999). The issuance of advisory opinions by federal courts has always been prohibited because such matters do not meet the "case or controversy" requirements contained in U.S. Const. art. III, § 2, cl. 1. See Muskrat v. U.S., 219 U.S. 346, 356-57, 31 S.Ct. 250, 254, 55 L.Ed. 246, 250 (1911); Hayburn's Case, 2 U.S. 409, 410, 1 L.Ed. 436 (1792). See also Massachusetts v. Environmental Protection Agency, ___ U.S. ___, ___, 127 S.Ct. 1438, 1452, 167 L.Ed. 2d 248, 267 (2007). Notwithstanding the absence of a case or controversy standard in the State Constitution, courts in New Jersey do "not render advisory opinions or function in the abstract." Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). ***In re Determination by Director of the Division of A.B.C.***, 921 A.2d 1159 (A.D. 2007)

Petitioner's Independent Action

Petitioner filed an independent action on 4/20/06 to have the 7/21/04 judgment set aside for fraud upon the court and because it was void on its face (P 46-51). During the summary judgment motion instituted by Sparta's attorney, he made a binding judicial admission [29] in his brief [30] by admitting to arguing exhaustion in the former case.[31] That admission is consistent with the trial judge's dismissal for a lack of jurisdiction in the 7/21/04 judgment (P28-29). Therefore, both the judge and Sparta's attorney knew the 7/21/04 judgment involved a dismissal for a lack of jurisdiction, not a

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[29] "When a party has admitted to a fact, the opposing party may "dispense with proof of facts for which witnesses would otherwise be called" as to that issue, and "any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880)." ***Philadelphia Reinsurance Corp. v. Employers Insurance of Wausau,*** 61 Fed.Appx. 816 (3d Cir. 2003)

[30] Gospel Missions of America v. City of Los Angeles, 328 F.3d 548, 557 (9th Cir. 2003) (stating that court of appeals has discretion whether to treat a concession in a pleading or brief as a binding judicial admission). ***Berckeley Investment Group, Ltd. v. Colkitt***, 455 F.3d 195 (3d Cir. 2006)

[31] "Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." (P59)

merits ruling. The judge's 06/23/06 summary judgment order shows the judge dismissed the complaint on res judicata grounds and further denied petitioner's recusal motion (P1-7). In that order, the judge expressly stated; "plaintiffs complaint Docket No. L-1106-06 is barred by the doctrine of res judicata as to the same issues raised." Except, the judge knows the former complaint was dismissed for a lack of jurisdiction, which deprived the judge of jurisdiction to reach the merits. ***Pleasantville Taxpayers.*** By admitting to having argued exhaustion in the former case, the judge and Sparta's attorney knew the court did not enter a decision on the merits that could support res judicata in this case.[32] Therefore, Sparta's attorney violated judicial

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[32] ""The term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). Three elements must be met for res judicata to apply: "[1] the judgment relied upon must be valid, final and on the merits; [2] the parties in the two actions must be either identical or in privity with one another; [3] the claims [in the subsequent case] must grow out of the same transaction or occurrence." Olds v. Donnelly, 291 N.J. Super. 222, 232 (App. Div.), aff'd, 150 N.J. 424 (1997) (citing Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398 (1991)). "For the purposes of res judicata, causes of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence." Watkins, supra, 124 N.J. at 413. A litigant must present all

estoppel by arguing the 7/21/04 judgment represented a decision on the merits contrary to his own admission and the judge's dismissal for a lack of jurisdiction.

Facts Overlooked by the Appellate Division

The Appellate Division overlooked facts that prove two judicial estoppel violations and the resulting fraud upon the court.[33] In its decision, they claim to have reviewed the record, which includes the 7/21/04 judgment. Except, they overlooked the following facts.

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theories in the first action when seeking to remedy a single wrong. Ibid. ***Hawkins v. Garden State Surgical Assoc., P.A.***, No. A-3952-06T3 (App.Div. 2008)

[33] "Rather than pursuing that avenue, plaintiffs filed an inverse condemnation action in 1999. That matter was tried before Judge Bozonelis, and on July 21, 2004, he filed an order and eleven-page written opinion dismissing plaintiffs' suit. Plaintiffs filed two motions for reconsideration, both of which were denied. Plaintiffs then appealed to this court, but their appeal was dismissed for lack of prosecution. Their attempts to obtain review in the Supreme Court were also unsuccessful. In April 2006 plaintiffs filed the present action in which they assert the same claims which they unsuccessfully pressed in their 1999 suit. Defendants moved for summary judgment, which Judge Bozonelis granted. Plaintiffs have appealed from that order. **Having reviewed the record, we are satisfied the order granting summary judgment to these defendants should be affirmed** substantially for the reasons stated by Judge Bozonelis in his statement of reasons appended to the order of June 23, 2006. Affirmed." (P 10)

1. They make no reference to the unreversed 10/21/03 summary judgment order ((P12-13). Hence, they overlook the fact that petitioner is still entitled to the trial that was ended for a lack of jurisdiction, which would prove Sparta violated judicial estoppel and perpetrated a fraud upon the court by arguing exhaustion.

2. They make no refence to the fact that petitioner's current action sought to set aside the 7/21/04 judgment for fraud upon the court and for being void (P46-51). Instead they misrepresent the complaint that was presented (P46-51), as follows; "they assert the same claims, which they unsuccessfully pressed in their 1999 suit."

3. They also overlooked the fact that the trial judge dismissed the former complaint for a lack of jurisdiction for failing to exhaust administrative remedies (P28-29). Hence, it did not have jurisdiction to render a decision on the merits. ***Pleasantville Taxpayers.***

4. By ignoring the dismissal for a lack of jurisdiction, it was also able to ignore Sparta's judicial estoppel violation and fraud upon the court by arguing res judicata since there was no decision on the merits in the 7/21/04 judgment in order to support res judicata. ***Hawkins***.

5. The Appellate Division also ignored Sparta's attorney's admission that it argued exhaustion, which proves it could not argue a merits ruling existed.

Since the Apellate Division ignored petitioner's judicial estoppel argument and further ignored facts that are in the orders it reviewed, which would resulted in its sua sponte raising judicial estoppel, proves an abuse of discretion that makes its affirmation of res judicata manifestly unconscionable.

Moreover, by ignoring the foregoing facts, the Appellate Division ignored the facts that prove the trial judge denied petitioner's due process by ignoring its own previous dismissal for exhaustion in order to enter res judicata.[34]

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[34] A judgment can be voided on two grounds: (1) if the rendering court lacked subject matter jurisdiction or (2) if it acted in a manner inconsistent with due process of law. Wright & Miller, Federal Practice and Procedure § 2862. ***Construction Drilling, Inc. v. Chusid***, 131 Fed.Appx. 366 (3d Cir. 05/11/2005)

CONCLUSIONS

The foregoing shows the Appellate Division overlooked; the 10/21/03 summary judgment order, that portion of the 7/21/04 judgment that dismissed petitioner's complaint for a lack of jurisdiction, and Sparta's attorney's admission that he argued exhaustion in the former case. Had the Appellate Division not overlooked these facts it would have had to sua sponte raise judicial estoppel for the following reasons, thus proving an abuse of discretion.

1. The dismissal for exhaustion in the 7/21/04 judgment contradicts the position taken by Sparta to achieve the 10/21/03 summary judgment order.

2. The successful dismissal for exhaustion in the 7/21/04 judgment contradicts Sparta's subsequent res judicata argument since the dismissal for exhaustion provides no decision on the merits to support res judicata.

3. By overlooking an admission that shows Sparta argued exhaustion, the Appellate Division avoids a fact that proves Sparta intentionally contradicted the position taken in the 10/21/03 order and its subsequent grounds for res judicaia, thereby making affirmation of res judicata manifestly

unconscionable. Hence, Sparta's judicial estoppel violations hampered petitioner's presentation of their claims in both cases. ***United States v. Parcel of Land and Residence at 18 Oakwood Street.***

Petitioner respectfully submits that Sparta's attorney would not have twice perpetrated a fraud upon the court unless he believed Sparta did in fact take petitioner's lot for a public use. So, the conduct of the trial judge and the Appellate Division supports an inference that a judicial policy exists to intentionally deny petitioner their right to obtain compensation for a taking.

For all of the above stated reasons, this Court should grant this petition because petitioner's have been denied the trial that remains ordered in the 10/21/03 order by virtue of Sparta's judicial estoppel violations and their fraud upon the court. Hence, this Court's denial of this petition would represent a tacit approval of the fraud upon the court that was perpetrated with the assistance of New Jersey's courts, which shows their effort to conceal this

conduct represents a further breakdown in the integrity of the judicial process.[35]

CERTIFICATION

I, Nelson Fernandes, do hereby certify that this petition is presented in good faith and not for delay.

June 18, 2008 _____

Nelson Fernandes

[35] Georgia's highest court gave its tacit approval to this decision by denying certiorari. Id. ***McKnight v. Chicago Title Insurance Co., Inc.***, 358 F.3d 854 (11th Cir. 2004)